Supreme Court, U.S.
FILED

09-889 JAN 22 2010

OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

DANIEL M. ZACHEM,

Petitioner,

v.

PETER JAMES ATHERTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for his supervisory and advisory actions undertaken to facilitate a grand jury's ability to consider and vote on prosecution evidence.

PARTIES TO THE PROCEEDING

Petitioner Daniel M. Zachem is an Assistant United States Attorney in the District of Columbia. Zachem was a defendant in the district court and an appellee in the Court of Appeals.

Respondent Peter James Atherton was the plaintiff in the district court and the appellant in the Court of Appeals.

The other respondents were all defendants in the district court and appellees in the Court of Appeals: District of Columbia, Office of the Mayor; Superior Court of D.C., Office of the Clerk of Court; Duane B. Delaney, Clerk, Superior Court of D.C.; Roy Wynn, Director, Special Operations Division; Suzanne Bailey-Jones, D.C. Superior Court Juror Officer; and the U.S. Department of Justice Office of the Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Zachem respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

On April 5, 2007, the United States District Court for the District of Columbia (Honorable Henry H. Kennedy, Jr.) entered an order and memorandum opinion that, *inter alia*, granted Zachem's motion to dismiss based on absolute prosecutorial immunity. The opinion is unpublished, but it is available as *Atherton v. Dist. of Columbia Office of the Mayor*, 04CV0680, 2007 WL 1041659 (D.D.C. Apr. 5, 2007), and is reprinted in the Appendix ("App.") at 40-55a.

The United States Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part and remanded the case on June 2, 2009. That opinion is published as *Atherton v. Dist. of Columbia Office of the Mayor*, 567 F.3d 672 (D.C. Cir. 2009), and is reprinted here at App. 1-39a. On August 25, 2009, the Court of Appeals denied Zachem's petition for rehearing. The order is reprinted here at App. 56-57a.

JURISDICTION

The Court of Appeals entered its opinion and judgment on June 2, 2009 and denied rehearing on August 25, 2009. On November 13, 2009, Zachem sought an extension of time in which to file this petition, and on November 16, 2009, Justice Stevens extended the time to and including January 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Factual Background

In April 2004, Plaintiff-Respondent Peter James Atherton, proceeding *pro se*, filed his complaint ("Compl.")[1] in this *Bivens* action[2] in the United States District Court for the District of Columbia against multiple defendants: District of Columbia Superior

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[1] The Complaint, which was handwritten, is reprinted in a typed format here at App. 58-72a.

[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Court personnel, the D.C. Office of the Mayor, the office of the U.S. Attorney General, and Assistant United States Attorney ("AUSA") Daniel Zachem. Atherton alleged that he was improperly removed from grand jury service because of his Hispanic ethnicity, thereby violating his right to equal protection of the law. He also alleged that he had been deprived of an opportunity for grand jury service without a meaningful opportunity to be heard, thereby violating his right to due process.

Atherton was sworn in as a Superior Court grand juror for the District of Columbia on April 9, 2001, and his grand jury panel was scheduled to deliberate for 25 days. Compl. ¶¶ 1, 16; App. 59a, 61a. During the presentation of cases by various prosecutors, and after votes on some charges had already occurred, Atherton requested additional instructions for certain charges. *Id.* ¶¶ 18-21; App. 61-62a. Atherton's request caused a delay in deliberations and necessitated a second vote on certain charges. *Id.* ¶¶ 20-21; App. 61-62a. As a result, some grand jurors on Atherton's panel became hostile toward him and complained about his behavior. *Id.* ¶¶ 20, 21, 35, 38, 66; App. 61-62a, 64a, 69a.

On April 10, 2001, Atherton's grand jury panel requested the presence of AUSA Robin Ashton, the Grand Jury Deputy Chief, to answer questions. "Frequently grand jurors, not being satisfied with response of individual AUSA's, ask that a supervisor appear to continue the dialogue concerning particular legal issues." Electronic correspondence from Zachem to Juror Officer, Suzanne Bailey-Jones, dated April 12,

2001 ("Zachem E-mail.");[3] App. 74a. Several grand jurors raised concerns with Ashton regarding an unnamed colleague, who, in their view, was inhibiting the grand jury from discharging its function. *Id.*; App. 75a. Ashton counseled patience and collegiality and took no further action. *Id.*

On April 11, 2001, when Atherton continued to impede the function of the grand jury, an AUSA presenting evidence to Atherton's grand jury panel mentioned the problem several times to the Supervising Deputy Chief, AUSA Daniel Zachem. *Id.* AUSA Zachem, according to Atherton's complaint, "participated/ coordinated AUSA efforts seeking grand jury indictments" and "participat[ed] himself directly/ indirectly in efforts to obtain grand jury indictments." Compl. ¶¶ 33, 38, App. 63-64a. The presenting AUSA reported to Zachem that an individual grand juror was clearly frustrating the other grand jurors by requesting additional materials and extensively questioning the prosecutor and witnesses. Zachem E-mail; App. 75a. The presenting AUSA told Zachem that attempts to mollify the grand juror were unsuccessful, and the other grand jurors were clearly agitated. *Id.*

Later that same day, the presenting AUSA informed Zachem that Atherton's grand jury panel was

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[3] Although not part of, or attached to, the complaint, this correspondence was added to the record by Atherton with one of his district court filings, and it was part of the Joint Appendix filed in the Court of Appeals. Further, it was reprinted, almost in its entirety, and cited extensively in the Court of Appeals' opinion. *See Atherton*, 567 F.3d at 678-79; App. 7-8a. The correspondence is reprinted here at App. 73-77a.

demanding to see a supervising AUSA immediately, and Zachem responded to the request. *Id.* Once Zachem was inside the grand jury room, approximately five or six grand jurors, in Atherton's presence and *on the record*, stated that Atherton was frustrating the grand jury's ability to function. *Id.*; App. 76a. These grand jurors "expressed in emotional terms" that Atherton was either unwilling or unable to follow the rules regarding, among other things, the burden of proof, an orderly deliberative process, and voting. *Id.* "Nodding heads greeted one comment that suggested that the time of all participants in the process, including witnesses, prosecutor and court reporters, was being wasted." *Id.*

Zachem expressed no views, but listened politely to the grand jurors. He then left the grand jury room without expressing an opinion, but promised the grand jurors that he would bring the matter to the immediate attention of the court for prompt resolution. *Id.* The grand jury foreman, who was visibly exasperated, followed Zachem out of the room and told him that he had tried to work with Atherton, but to no avail. *Id.*

Zachem contacted Roy Wynn, the Director of the Special Operations Division of the District of Columbia Superior Court, who directed Zachem to Suzanne Bailey-Jones, Juror Officer for the Superior Court. *Id.* Zachem reported the complaints of other grand jurors to Bailey-Jones but told her that he did not think it was appropriate for the United States Attorney's Office to take a position with respect to the removal of an individual grand juror from service. *Id.*; App. 77a. After the discussion with Bailey-Jones, Zachem returned to

the jury room, directed Atherton to report to the Juror Office, and collected Atherton's grand jury notes. Compl. ¶ 23; App. 62a. Atherton was ultimately directed to Bailey-Jones, who dismissed him from the grand jury. *Id.* ¶ 24; App. 62a. In correspondence to Bailey-Jones the day after Atherton's dismissal, Zachem wrote: "I am entirely confident in reporting [ ] that based upon my observations, if [Atherton] was permitted to remain, that Grand Jury April #1 would not have been able to discharge its function." Zachem E-mail; App. 77a.

B. Proceedings Below

The district court, which had jurisdiction pursuant to 28 U.S.C. § 1331 and 1346(b), dismissed the claims against all defendants. With regard to AUSA Zachem, the court held that the claims against him were barred by principles of absolute prosecutorial immunity. *Atherton v. Dist. of Columbia Office of the Mayor*, 2007 WL 1041659, at *7; App. 54-55a. The court reasoned that at all relevant times, Zachem was performing his prosecutorial duties, and that prosecutors have absolute immunity from claims arising out of the presentation of evidence to a grand jury in the course of seeking indictments. *Id.*

The Court of Appeals, *inter alia*, reversed the grant of absolute immunity to Zachem and remanded the case for consideration of whether Zachem was entitled to qualified immunity from Atherton's claims. The court noted that prosecutors are entitled to absolute immunity for conduct "'intimately associated with the judicial phase of the criminal process'" – *i.e.*, acts

undertaken to prepare for the initiation of judicial proceedings or that otherwise occur in their role as advocates for the State. *Atherton*, 567 F.3d at 682 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); App. 16a. The court confirmed that such acts may include "prosecutors' conduct before grand juries," *id.* at 686 (citing *Burns v. Reed*, 500 U.S. 478, 492-96 (1991)); App. 27a, but it concluded that Zachem's conduct did not meet these criteria:

> Zachem's conduct was not comparable to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity: His role in Atherton's dismissal from the grand jury was not related to a decision whether to prosecute an individual; it did not involve his participation in a probable cause hearing; it was not a presentation of the state's case at trial; and it did not concern the evaluation or selection of evidence for presentation to a grand jury.

Id. (internal citations omitted); App. 26-27a.

The Court of Appeals also distinguished this Court's recent decision in *Van de Kamp v. Goldstein*, __ U.S.__, 129 S. Ct. 855 (2009). *Id.* at 687; App. 28a. In *Van de Kamp*, this Court held that supervising prosecutors are entitled to absolute immunity against claims related to their supervision and training of subordinate prosecutors. 129 S. Ct. at 861-62. This Court noted that although the function of the supervising prosecutors was administrative in nature, it was "directly connected with the conduct of a trial," and "necessarily

require[d] legal knowledge and the exercise of related discretion." *Id.* at 862. The Court of Appeals found *Van de Kamp* "inapposite," and stated that Zachem's alleged conduct in removing Atherton from the grand jury "had nothing to do with a prosecutor's preparation for or participation in a criminal trial." *Atherton*, 567 F.3d at 687; App. 28a.

On August 25, 2009, the Court of Appeals denied Zachem's petition for rehearing. App. 56-57a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision conflicts with rulings by other circuits and the Supreme Court and significantly erodes the protection of absolute immunity for prosecutors. This is an issue of critical importance to the sound functioning of the criminal justice system, and if left undisturbed, the ruling below will have a potentially harmful and lasting impact on every prosecutor in the country who interacts with grand juries. As such, the Court should grant the petition for a writ of certiorari to: (1) resolve the conflict among the circuits regarding the scope of absolute immunity for a prosecutor's supervisory and advisory conduct related to a grand jury; (2) ensure the correct application of its precedents on absolute immunity for prosecutors to the context of this case; and (3) review and address this broad-reaching issue of great national importance.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS AND THIS COURT.

A. There is a Circuit Split on the Application of Absolute Immunity to Prosecutors Supervising Grand Juries.

The District of Columbia Circuit's decision conflicts with decisions of at least two other circuit courts of appeal—the Eighth and Second Circuits—regarding the scope of immunity for a prosecutor fulfilling his supervisory and advisory duties to a grand jury. As a preliminary matter, the law on whether absolute immunity extends to a prosecutor's actions in presenting the government's evidence to a grand jury is well-settled. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (prosecutors are immune from claims arising out of the "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury"); *see also, e.g., Burns*, 500 U.S. at 490 (noting that common law immunity extended to prosecutors participating in "any hearing before a tribunal which performed a judicial function") (quotation marks and citation omitted); *id.* at 490 n.6 (there is "widespread agreement" that absolute immunity extends to a prosecutors' "conduct before grand juries"). The question raised here, however, is whether a supervisory prosecutor who does not actively present evidence to a grand jury may still be entitled to absolute immunity. In conflict with the ruling at issue here, other circuit courts of appeal have answered this question in the affirmative.

For example, in *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1053 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3036 (1993), the Eighth Circuit upheld a trial court's grant of absolute immunity to prosecutors who were sued not for their role in presenting evidence to a grand jury, but in serving as "the grand jury's legal advisers" and helping the grand jury draft an investigatory report. The court held that such advisory conduct was protected by absolute immunity because it "put the prosecutors in the midst of an activity 'intimately associated with the judicial phase of the criminal process.'" *Id.* at 1054 (quoting *Imbler*, 424 U.S. at 430).

In explaining its decision, the court noted that "prosecutors assisting the grand jury perform its quasi-judicial duties would risk entanglement in vexatious litigation if they were not absolutely immune from civil liability." *Id.* The court expressed concern that "prosecutors who are duty bound to work with the grand jury" would have to face the "wrath" of "disgruntled litigants, upset with the grand jury but unable to sue the grand jurors" (who are protected by absolute immunity). *Id.* This was a remarkably prescient concern, given the events in the instant case. Atherton could not direct his displeasure at the grand jurors—who caused his dismissal by expressing a "hostile attitude" toward him, Compl. ¶ 66; App. 69a, summoning Zachem to the grand jury room, and complaining about Atherton on the record—because they are protected by absolute immunity. Instead, he filed his lawsuit against Zachem (and others), who, like the prosecutors in *DeCamp*, was trying to facilitate the function of the grand jury. As the Eighth Circuit noted, "[p]rosecutors

who faithfully carry out the wishes of the grand jury should not be a lightning rod for harassing litigation aimed at the grand jury." 978 F.2d at 1054 (quotation marks and citation omitted).

It is worth noting, moreover, that such "disgruntled litigants," who are sufficiently threatening to warrant the extension of absolute immunity, are *not* limited to criminal defendants suing opposing prosecutors. On the contrary, the plaintiff in *DeCamp* was actually, *just like Atherton*, "not a target of the grand jury investigation and was not prosecuted . . . in any way." 978 F.2d at 1052 (Heaney, J. dissenting). A partially-dissenting member of the *DeCamp* panel cited this factor in voting to deny the prosecutors absolute immunity from suit, stating that the "prosecutors could not have been performing a prosecutorial function" as to the plaintiff. *Id.* The majority, however, rejected this view and, thus, *DeCamp* stands for the proposition that absolute immunity is afforded to prosecutors even when they are sued by plaintiffs who are not targets of their prosecutorial conduct.

The *DeCamp* court saw the inherent value of prosecutors giving candid advice to grand juries and felt that extending absolute immunity to prosecutors acting in that function was the best way to ensure it would continue:

> The need for the grand jury to receive accurate, untempered legal advice from prosecutors supports our conclusion. Apprehension over potential damages liability would provide prosecutors a powerful

> incentive to avoid giving meaningful advice and assistance on subjects likely to provoke civil lawsuits. "The resulting timidity would be hard to detect or control, and it would manifestly detract from" the grand jury's effectiveness as a judicial tribunal.

Id. at 1054 (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)). The Court of Appeals' ruling in the instant case effectively rejects that analysis.

Another case with a striking resemblance to the case here, but also with a different outcome, is *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990). There, the Second Circuit granted absolute immunity to supervisory prosecutors who were not presenting evidence, but who advised and oversaw the confiscation of unauthorized material from a grand jury. Of particular note, the plaintiff was not a criminal defendant; instead, like here, the plaintiff was a *disgruntled grand juror* (who had attempted to disseminate unauthorized material).

The court acknowledged that, "[g]enerally, only conduct falling within the prosecutor's litigation-related duties deserves the shield of absolute immunity." *Id.* at 1120 (citations omitted). Yet it concluded that the prosecutors' conduct in "advising" the grand jury was "intimately associated with the judicial phase of the criminal process . . . ," and the prosecutors' acts were "undertaken pursuant to their *legal obligation to supervise the jury.*" *Id.* (quotation marks and citations omitted, emphasis added). "Accordingly, the [prosecutors] are absolutely immune from suit" because their "*supervision of the grand jury . . .* constituted activity within the scope of their judicial duties." *Id.* & n.2 (emphasis added).

These decisions from the Eighth and Second Circuits afforded absolute immunity to prosecutors working with grand juries in advisory and supervisory roles that are similar to the role that Zachem played here.[4] Furthermore, both cases pre-date this Court's *Van de Kamp* decision, which strengthened the concept of absolute immunity for supervisory prosecutors. Thus, there is a conflict among the circuits, and this Court should grant the petition to resolve this important issue and ensure the uniform application of absolute immunity for prosecutors.

B. The Ruling Below Conflicts with This Court's Precedents.

1. The Rationale for Extending Absolute Immunity to Prosecutors.

This Court's seminal decision in *Imbler v. Pachtman*, held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."[5] 424 U.S. at 431. The Court decided that a prosecutor was absolutely immune from claims that he knowingly

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[4] *But see Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) (holding that prosecutors working with a grand jury who are "advising rather than advocating . . . could *arguably* not be entitled to absolute immunity" (emphasis added)).

[5] Although the instant matter is a *Bivens* action and not brought under 42 U.S.C. § 1983, this Court has held that the analysis of immunity for a government official who is sued in his personal capacity is "identical under either cause of action." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

presented false testimony at trial and deliberately withheld exculpatory evidence from the defense. *Id.* at 416, 431 & n.34. In reaching this decision, the Court concluded that such activities were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430.

Those reasons "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. Such suits, the Court noted, "could be expected with some frequency," and forcing prosecutors to defend their advocatory decisions, perhaps years after they were made, could impose "intolerable burdens." *Id.* at 425, 426.

The Court also concluded that the lesser protections of *qualified* immunity are not adequate. "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest." *Id.* at 427. The Court determined that absolute immunity is essential to promote the "vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28.

In subsequent cases, the Court has adopted a "functional approach" in determining which actions are

entitled to absolute immunity. *Burns*, 500 U.S. at 486. Under this approach, the function of a prosecutor's conduct—typically advocatory or administrative—determines the availability of absolute immunity. For instance, a prosecutor is absolutely immune for carrying out prosecutorial duties as an advocate for the government in judicial criminal proceedings. *Kalina v. Fletcher*, 522 U.S. 118, 128-129 (1997). *See also id.* at 129 (preparing and filing charging documents); *Buckley*, 509 U.S. at 272 (presenting the state's case at trial); *Burns*, 500 U.S. at 491 (participating in a probable cause hearing). Conversely, a prosecutor is only entitled to qualified immunity when conducting "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings . . . ." *Buckley*, 509 U.S. at 273. Although this Court has been "sparing in its recognition of claims to absolute official immunity," *Forrester*, 484 U.S. at 224, it has nevertheless consistently reaffirmed that prosecutors' acts that are intimately related to the judicial process are entitled to absolute immunity. *See Kalina*, 522 U.S. at 128-29; *Buckley*, 509 U.S. at 272; *Burns*, 500 U.S. at 490-91. Further, as noted above in Section I.A., it is well-established that absolute immunity extends to a prosecutor's conduct in seeking an indictment from a grand jury.

This Court's most recent decision on the issue, *Van de Kamp*, is of critical importance here because it made it clear that absolute immunity can be extended to prosecutors even for "*administrative*" activities. 129 S. Ct. at 861-62. The plaintiff in *Van de Kamp* sued supervisory prosecutors for allegedly failing to train or

supervise line prosecutors sufficiently with regard to sharing jailhouse-informant information and for failing to institute an information-sharing system. The Court found that these managerial and supervisory activities were protected by absolute immunity because of their close connection to the judicial phase of the criminal process. *Id.* at 862.

Furthermore, the Court acknowledged that *Van de Kamp* was a departure of sorts from its prior jurisprudence, stating, "[t]his case, unlike the[ ] earlier cases, requires us to consider how immunity applies where a prosecutor is engaged in certain *administrative* activities." *Id.* at 861 (emphasis added). The Court explained that the "administrative obligations" at issue in *Van de Kamp* were very different than the activities typically left unprotected from absolute immunity, such as "workplace hiring, payroll administration, the maintenance of physical facilities," or other tasks unrelated to a prosecutor's advocatory function. *Id.* at 862. Instead, the supervisory activities at issue, which "necessarily require[d] legal knowledge and the exercise of related discretion," pertained to a prosecutor's core prosecutorial function as advocates for the State and, therefore, were protected by absolute immunity. *Id.*

2. The Court of Appeals Misapplied Supreme Court Precedents.

The Court of Appeals misapplied this Court's absolute immunity precedents to this case. The court began correctly by explaining that courts apply a "functional approach" in deciding which actions by a prosecutor are entitled to absolute immunity. *Atherton*,

567 F.3d at 684; App. 21a. And, as noted, prosecutors have been granted absolute immunity under this functional approach for carrying out functions that are "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, and for their work in connection with grand jury proceedings. *Burns*, 500 U.S. at 490.

Nonetheless, the Court of Appeals concluded that AUSA Zachem's conduct in relation to the grand jury was not protected by absolute immunity. Citing *Ex Parte Virginia*, 100 U.S. 339 (1879),[6] among other cases, the court noted that even though certain acts performed by government officials may be vital to the functioning of a sound judicial system, they may not be sufficiently judicial or adjudicative in nature to be entitled to absolute immunity. In reaching its decision about Zachem, the court focused solely and inexplicably on the allegation that he "procured or participated in the unlawful removal of a sworn grand juror," and held that this conduct "surely did not occur in the course of his role as an advocate for the State." *Atherton*, 567 F.3d at 686 (quotation marks omitted); App. 26a.

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[6] The court's reliance on *Ex Parte Virginia* is misplaced because in that case, a judge was accused of racial discrimination in creating *juror rolls* that would be used to fill juries in *unspecified future cases*. Because the conduct was unrelated to a judicial role in any specific jury or case, it was considered "ministerial" and not protected by absolute immunity. 100 U.S. at 348. Zachem, however, was responding to concerns of *sitting* grand jurors that another grand juror was interfering with a line prosecutor's ability to effectively present the prosecution's evidence *in specific cases* for which indictments were being sought. Zachem's conduct, therefore, related to the supervision and management of a quintessential advocatory function: the presentation of the government's case to a grand jury.

The court also discussed the specific prosecutorial conduct that was accorded absolute immunity in *Imbler*, *Burns*, *Buckley*, and *Kalina*, and stated that "Zachem's conduct was not comparable to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity." *Id.* Finally, the court held that the reason for extending absolute immunity to the defendants in *Van de Kamp* was inapplicable because the supervisors' administrative activities in that case were "directly connected with the prosecutor's basic trial advocacy duties," whereas Zachem's conduct "had nothing to do with a prosecutor's preparation for or participation in a criminal trial." *Id.* at 687; App. 28a (quotation marks and citation omitted). The court's attempt to apply these cases to the instant facts was mistaken in several key aspects.

a. The Court of Appeals Fundamentally Misconstrued AUSA Zachem's Function.

One reason the Court of Appeals misconstrued the pertinent Supreme Court precedents is that it was fundamentally mistaken about the function Zachem fulfilled by (a) appearing in the grand jury, (b) hearing individual grand juror complaints, and (c) reporting those complaints to court officials. The court focused only on the ultimate removal of Atherton from grand jury service and lost sight of the fact that Zachem's function was *not* about judging Atherton's fitness to serve. In fact, neither Zachem nor the U.S. Attorney's Office had any authority to judge a grand juror's fitness. That authority resided solely with the court. *See* D.C. Superior Ct. R. Crim. Proc. 6(g); App. 78a (Chief Judge or his designee may excuse a grand juror for cause

shown); *cf.* 28 U.S.C. § 1866(c)(2) (providing that the court may exclude federal grand juror from service on the grounds that "his service as a juror would be likely to disrupt the proceedings"). Hence, when Zachem reported the complaints about Atherton to court officials, he *specifically* stated that he did not think it was appropriate for the U.S. Attorney's Office to take a position on the removal of a juror from service. Zachem E-mail; App. 77a; *see also Atherton*, 567 F.3d at 687; App. 27a.

The function that Zachem *actually* undertook was directly related to the prosecution's core function of presenting a case to the grand jury. Upon being summoned to the grand jury, Zachem heard multiple jurors complain that Atherton was impeding their ability to consider the prosecution's evidence and to determine whether to issue indictments. *See* Zachem E-mail; App. 75a. The grand jurors stated that Atherton was unwilling or unable to follow rules regarding the burden of proof necessary to return an indictment, procedures for an orderly deliberative process, and voting. *Id.*; App. 76a. Because Zachem's judgment led him to conclude that Atherton was preventing the grand jury from considering the government's evidence and carrying out its function, he reported the situation to court officials for such further action as the court deemed appropriate. Conduct such as this—soliciting the court's assistance to ensure that the grand jury could consider and vote on the prosecution's case—relates directly to the initiation of a prosecution and the prosecutor's role as advocate for the State. Such functions are indisputably protected by absolute immunity. *See Buckley*, 500 U.S. at 271.

Atherton's own complaint acknowledges that Zachem's function was not limited to juror removal. It states that Zachem's function included advancing the prosecution's efforts to obtain indictments. *See* Compl. ¶¶ 33, 38; App. 63-64a (Zachem "participated/ coordinated AUSA efforts seeking grand jury indictments" and "participat[ed] himself directly/ indirectly in efforts to obtain grand jury indictments."). Plainly, "coordinat[ing] AUSA efforts seeking grand jury indictments," which Zachem did by facilitating the grand jury's consideration of evidence presented by line prosecutors, is conduct protected by absolute immunity. Yet the Court of Appeals completely ignored this function.

The court, however, did *not* ignore Zachem's statement to court officials about not taking a position on juror removal. Instead, the court inexplicably claimed that this statement showed that Zachem "*knew* that his involvement [with the grand jury] had *nothing* to do with his advocatory duties as a prosecutor." *Atherton*, 567 F.3d at 687; App. 27a (emphasis added). But this conclusion is an unfounded leap of logic. That Zachem took no position on Atherton's *ultimate removal* hardly meant that his "involvement"—*i.e.*, appearing in the grand jury, listening to juror complaints, and reporting those complaints to court personnel—was unrelated to his core prosecutorial role. On the contrary, the whole purpose of his interaction with the grand jury and Atherton was to facilitate the grand jury's consideration of the prosecution's evidence. The Court of Appeals turned the reality of the situation on its head—Zachem's conduct had *everything* to do with his advocatory function.

The Court of Appeals' misapprehension of Zachem's function also tainted its application of *Van de Kamp*. In deciding that Zachem's conduct "had nothing to do with a prosecutor's preparation for or participation in a criminal trial," *Atherton*, 567 F.3d at 687; App. 28a, the court ignored Zachem's supervisory and advocatory function in facilitating the grand jury's consideration of the prosecution's evidence. Just like the defendant prosecutors in *Van de Kamp*, who played a supervisory role over "basic trial advocacy duties," 129 S. Ct. at 863, Zachem played a supervisory role over the basic grand jury advocacy duties: the presentation of the government's evidence. Although he did not literally present evidence himself, he nonetheless played an integral role in the grand jury's consideration of the prosecution's cases.

Similarly, the Court of Appeals ignored *Van de Kamp's* decree that activities that "necessarily require legal knowledge *and the exercise of related discretion* . . ." are protected by absolute immunity. 129 S. Ct. at 862 (emphasis added). Here, Zachem's function involved judgment on legal strategy and *discretion*, which factored into his decision to report the complaints to court personnel. That Zachem's conduct was discretionary is demonstrated by what happened just one day earlier. There, AUSA Ashton—performing the same supervisory role as Zachem—chose *not* to report the grand juror's complaints about Atherton to court officials. Instead, she "counseled patience and collegiality" and did nothing more. Zachem E-mail; App. 75a. AUSA Ashton apparently determined that, at the time, it was in the best interest of the government *not* to report complaints about Atherton to the court. This

is not an illogical conclusion, considering the government's incentive to avoid allegations from a defendant that the prosecution has meddled with a grand jury's independent deliberative process. When the problems persisted, however, Zachem used his discretion and judgment to determine that he needed to report the complaints to the court to facilitate the functions of the grand jury and those of his subordinate AUSAs presenting evidence to the grand jury.

In sum, the function that Zachem fulfilled with regard to Atherton's grand jury panel was intimately related to the judicial process and his function as an advocate for the government. Indeed, it would have been impossible for a non-prosecutor to do what Zachem did because apart from jurors and witnesses, only prosecutors have access to the grand jury room. Yet Zachem is entitled to absolute immunity *not* because his actions only could have been carried out by a prosecutor, but because his conduct played a critical role in the government's effective presentation of evidence to a grand jury and the initiation of a prosecution.

b. The Court of Appeals Failed to Give Adequate Consideration to the Potential for Vexatious Litigation Against Supervisory Prosecutors.

One factor the Court of Appeals addressed in deciding whether absolute immunity is appropriate is whether the "the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect." *Atherton*, 567 F.3d at 683; App. 18a (quoting *Wagshal v. Foster*, 28 F.3d 1249,

1252 (D.C. Cir. 1994)). The court engaged in minimal discussion about this issue with regard to Bailey-Jones, but gave *no* analysis with regard to Zachem, other than to conclude that "[a]s discussed above in relation to Bailey-Jones[,] . . . Zachem did not demonstrate . . . that future harassment or intimidation by litigants is a realistic prospect." *Id.* at 687; App. 29a (quotation marks and citation omitted).

The problem with this logic is that the court's analysis for Bailey-Jones focused solely on the likelihood of lawsuits against a *juror officer* and other *court personnel*, such as a court reporter. *See id.* at 685 (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993) (absolute immunity not extended because defendant did not demonstrate the "existence of any significant volume of vexatious and burdensome actions against [court] reporters . . . .")); App. 23a. Therefore, the court concluded as to Bailey-Jones that "*qualified* immunity should more than suffice to protect *juror officers and other like public officials in the Superior Court*." *Id.* (emphasis added).

Although such analysis applies to Bailey-Jones, it should not be extrapolated to *prosecutors*, who are much more likely to face vexatious lawsuits. Indeed, in *Imbler*, this Court specifically explained why qualified immunity is insufficient for prosecutors. 424 U.S. at 427; *see* Section I.B.1 *supra*. Thus, it was a mistake for the court simply to extend its conclusion about Bailey-Jones to Zachem without any additional analysis. This Court's immunity decisions underscore that prosecutors get sued with regularity, and, as demonstrated in *Van de Kamp*, *DeCamp*, *Fields* and here, supervisory

prosecutors are also likely targets as defendants. Moreover, courts have acknowledged the valuable role that prosecutors play in advising grand juries and have recognized that the prospect of facing lawsuits for such conduct "would provide prosecutors a powerful incentive to avoid giving meaningful advice and assistance . . . ." *DeCamp*, 978 F.2d at 1054. Therefore, it is clear that the Court of Appeals here failed to give adequate consideration to the likelihood of vexatious lawsuits against supervisory prosecutors.

c. The Court of Appeals Overlooked Existing Safeguards, Which Obviate the Need for a Private Damages Suit.

The last factor the Court of Appeals considered in deciding whether absolute immunity is appropriate is whether the existing "system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct." *Atherton*, 567 F.3d at 685; App. 24a (quoting *Wagshal*, 28 F.3d at 1252). With little analysis, the court concluded that there were not adequate "safeguards" to protect Atherton when he was dismissed. *Id.* at 687; App. 29a. But this conclusion overlooked at least two existing safeguards that would constrain unconstitutional conduct by prosecutors.

First, as stated, the U.S. Attorney's Office has no authority to dismiss a grand juror. The very most a prosecutor can do is relay a concern about a grand juror to the court for appropriate action. Second, because any effort to remove a grand juror exposes the prosecution to allegations from criminal defendants that

it has manipulated the grand jury's deliberative process, there is a strong institutional incentive to exercise great care before raising such concerns with the court. These checks on prosecutorial action further support the extension of absolute immunity to Zachem. *See Butz v. Economou*, 438 U.S. 478, 512 (1978) (safeguards built into judicial process reduce need for private damages action and support absolute immunity).

II. THE COURT OF APPEALS' DECISION AND ITS EROSION OF ABSOLUTE IMMUNITY FOR PROSECUTORS MAKES THIS AN EXCEPTIONALLY IMPORTANT CASE THAT WARRANTS THE COURT'S REVIEW.

The ruling by the Court of Appeals erodes vital protections that have long been afforded to prosecutors engaged in conduct that is intimately associated with the judicial phase of the criminal process. Left undisturbed, the erosion of absolute immunity for prosecutors represented by this decision will likely influence the conduct of every prosecutor in the United States with involvement before grand juries. This Court has repeatedly stressed the importance of protecting prosecutors from damages actions arising from the performance of the prosecutorial function. The issue presented here—the scope of immunity for a prosecutor fulfilling his supervisory duties to a grand jury by facilitating its consideration of the prosecution's evidence—warrants this Court's attention once again.

Although Zachem did not present evidence to the grand jury, he was still acting on behalf of the government in an advocatory and prosecutorial function

when he interacted with the grand jury and Atherton. The grand jury panel requested Zachem's presence as the supervising attorney, and multiple grand jurors stated to Zachem, *on the record*, that Atherton was impairing their ability to consider the prosecution's evidence and to vote on indictments. Zachem's concern about the grand jury's ability to carry out its function was directly related to a vital governmental interest—the grand jury's ability to consider the prosecution's evidence without interference. Thus, when Zachem reported the grand jury's complaints about Atherton to D.C. Superior Court officials, he was performing a function intimately connected to the prosecution's core role as advocate for the government. Such conduct is entitled to absolute immunity under this Court's precedents, but the Court of Appeals held differently.

Given the critical importance of absolute immunity for prosecutors to the proper functioning of the criminal justice system, there can be little doubt that the ruling below will have a broad-reaching impact. The concerns raised herein, therefore, fully warrant the Court granting this petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JUNE 2, 2009

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 07-5195.

PETER JAMES ATHERTON,

Appellant

v.

DISTRICT OF COLUMBIA OFFICE OF THE MAYOR, et al.,

Appellees.

Argued March 6, 2009.
Decided June 2, 2009.
Rehearing En Banc Denied Aug. 25, 2009.

Before: KAVANAUGH, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge EDWARDS.

Appendix A

EDWARDS, Senior Circuit Judge:

On April 9, 2001, appellant Peter James Atherton was sworn in as a District of Columbia Superior Court grand juror. The grand jury was scheduled to deliberate for 25 days. However, on April 11, Atherton was permanently removed from grand jury service after an Assistant United States Attorney ("AUSA") who was presenting evidence to the grand jurors reported to the supervising AUSA, Daniel Zachem, that the jurors were complaining about Atherton. After meeting with members of the grand jury, Zachem contacted the Director of Special Operations at the Superior Court, Roy Wynn, who directed him to juror officer Suzanne Bailey-Jones. Zachem discussed the matter with Bailey-Jones and then returned to the jury room, confiscated Atherton's notes, and directed him to report to the Juror Office. Bailey-Jones then summarily and permanently removed Atherton from the grand jury for being "disruptive." Atherton was never given a written explanation for his removal from the grand jury, and he was not afforded a hearing before any court official or judge.

In April 2004, Atherton filed a *pro se* complaint in the District Court, contending that he was unlawfully removed from grand jury service because of his deliberative judgments and his Hispanic ethnicity. Atherton's complaint named Bailey-Jones, Wynn, Zachem, and several other city and federal officials, as well as the District of Columbia and the Department of Justice Office of the Attorney General. The complaint

alleged constitutional violations of due process and equal protection against the District of Columbia ("District") defendants and the federal defendants, citing 42 U.S.C. §§ 1983, 1985(3), 1986, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), as well as a common law fraud claim.

The District Court granted the District and federal defendants' motions to dismiss the complaint for failure to state a claim. *Atherton v. District of Columbia Office of the Mayor, et al.*, No. 04-0680, 2007 WL 1041659 (D.D.C. Apr. 5, 2007). The District Court first found that Atherton had failed to allege that any defendants other than Bailey-Jones and Zachem were directly involved in his dismissal, and that Atherton had not stated a claim for municipal liability against the District of Columbia. The court also dismissed the §§ 1985(3) and 1986 claims, and found that the fraud claim against Zachem was barred by sovereign immunity. Finding that Atherton's allegations did not support any personal involvement by Wynn in the decision to remove Atherton from the grand jury, the District Court dismissed the equal protection and due process claims against Wynn on the ground that Atherton had failed to state claims upon which relief may be granted. Although the District Court found that Atherton had stated claims against Bailey-Jones and Zachem for due process and equal protection violations, these claims were dismissed on the ground that Bailey-Jones and Zachem were entitled to absolute immunity. Atherton, with the able support of appointed *amicus curiae*, now seeks reversal of the District Court's judgment.

Appendix A

We reverse the District Court's dismissal of the due process claims against Bailey-Jones and Zachem. The District Court erred in holding that Bailey-Jones and Zachem enjoy absolute immunity for the removal of a grand juror. We will remand the case to allow the District Court to assess whether Bailey-Jones and Zachem are protected by qualified immunity. We affirm the District Court's dismissal of Atherton's equal protection and § 1985(3) claims, and his due process claim against Wynn, because the complaint and supporting submissions fail to state causes of action. We affirm the District Court's dismissal of all remaining claims.

I. BACKGROUND

A. *Facts*

On review of a motion to dismiss, we "treat the complaint's factual allegations as true . . . and must grant [Atherton] the benefit of all inferences that can be derived from the facts alleged." *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (quotation marks and citation omitted). The facts recited below are drawn from the complaint and from additional materials submitted by Atherton, including affidavits and exhibits incorporated therein. The parties do not dispute that these documents may be considered for the purposes of this appeal. *See Amicus* Br. at 3 n. 1; D.C. Br. at 4 n. 2; *Greenhill v. Spellings*, 482 F.3d 569, 572 (D.C. Cir. 2007) (noting courts may "consider supplemental material filed by a pro se litigant in order

to clarify the precise claims being urged"); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) ("In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice.").

1. *Atherton's Complaint*

Atherton is a D.C. resident with degrees in electrical and nuclear engineering. Compl. ¶¶ 1, 68. On April 9, 2001, he was sworn in as a D.C. Superior Court grand juror for a term scheduled to last 25 days. *Id.* ¶¶ 1, 16. However, on April 11, 2001, Atherton was permanently removed from the grand jury. *Id.* ¶¶ 22-24.

Atherton and the grand jurors with whom he served were given jury instruction books identifying crimes and their elements. Atherton believed that some of the cases for which indictments were being sought included alleged crimes which were not in the instruction book. *Id.* ¶ 18. Concerned that grand jurors had voted to indict without knowing the elements of the crimes, Atherton requested additional information from an AUSA on the elements of crimes that were not contained in the instruction book. *Id.* ¶¶ 18-19. Some jurors "seemed upset" because they had voted to indict without knowledge of the elements "and a new vote would be needed once the elements of the charge were known." *Id.* ¶ 20. Atherton "felt a hostile attitude from a few members of the jury when there was continuing rebuttal to every comment [he] made concerning deliberation on elements of crimes." *Id.* ¶ 66.

Atherton also felt that his fellow grand jurors reacted negatively to his Hispanic ethnicity. At one point during their deliberations, the grand jury was considering a homicide case involving an altercation between black and Hispanic individuals. After a Hispanic witness had finished testifying, Atherton thanked the witness in Spanish. Atherton subsequently perceived hostility from other grand jurors based on this incident. *Id.* ¶¶ 64-67. He is half Mexican and "was the only semi-fluent [S]panish speaking grand juror." *Id.* ¶ 67.

During the course of grand jury deliberations on April 11, 2001, supervising AUSA Zachem entered the jury room where the grand jurors were deliberating, confiscated Atherton's notes, and directed Atherton to immediately report to Wynn's office. *Id.* ¶ 23-24. Atherton went to Wynn's office as he had been instructed. *Id.* Atherton was then directed to Bailey-Jones, who "permanently dismissed" him. *Id.* ¶ 24. Atherton "was never permitted the opportunity to defend himself," *id.* ¶ 28, and Bailey-Jones did not provide reasons for his dismissal, other than that he was allegedly "disruptive." *Id.* ¶ 24. Atherton asked for a written explanation and Bailey-Jones assented to this request. However, written notice was never given. *Id.* ¶¶ 28, 44. "Atherton left feeling very humiliated, embar[r]assed and questioning his self worth, and did not return to grand jury duty." *Id.* ¶ 27.

2. *Additional Materials Submitted by Atherton in Support of His Complaint*

The record before the District Court includes a copy of an email that Zachem wrote to Bailey-Jones the day after Atherton's removal. *See* Email from Dan Zachem to Suzanne Bailey-Jones (Apr. 12, 2001), *reprinted in* Joint Appendix ("J.A.") 61-62 ("Zachem email"). According to Zachem's account, an AUSA who was presenting evidence to the grand jury informed Zachem that some of the grand jurors had requested to see a supervisor about a "scientist" who was frustrating his colleagues. *Id.*, J.A. 61. The email states:

> [T]he AUSA reported that "the scientist" was desirous of additional written materials, including additional jury instructions and code provisions, and these requests, in conjunction with extensive questioning of both prosecutor and witness alike, [were] clearly agitating other members of the grand jury. Efforts were made to satisfy the requests of "the scientist" by, for example, providing xerox copies of several code provisions, but these efforts proved unsuccessful in mollifying his concerns. At approximately 3:00 p.m., Deputy Chief Dan Zachem was informed by the AUSA that the grand jury was demanding to see a supervisor "immediately." . . . Thereafter, behind closed doors, on the record and in the presence of the scientist, several grand jurors, no fewer than 5-6 in number, expressed the

> view that a single grand jury member was frustrating the grand jury's ability to conduct business. More specifically, these grand jurors, who were not contradicted by any of their number, expressed in emotional terms their belief that the offending grand juror was "either unwilling or unable to follow the rules" regarding, among other things, the burden of proof, an orderly deliberative process and voting.

Id.

Zachem's email states further that he spoke briefly to defendant Roy Wynn in the D.C. Superior Court Juror's Office, and that Wynn directed him to defendant Bailey-Jones. *Id.* Zachem acknowledged that he did "not think it appropriate for the U.S. Attorney's Office . . . to take a position with respect to the removal of a particular juror from service." *Id.*, J.A. 62. But he added: "I am entirely confident in reporting, however, that based upon my observations, if [Atherton] was permitted to remain, that [the] Grand Jury . . . would not have been able to discharge its function." *Id.*

In addition to Zachem's email, the District Court record also includes a copy of Superior Court rules covering the removal of grand jurors. These rules, which were in effect when Atherton was removed from grand jury service, stated:

(g) Discharge and excuse.

> A grand jury ordered by the Superior Court shall serve until discharged by the Chief Judge or other judge designated by the Chief Judge; but no grand jury may serve more than 18 months unless the Chief Judge or designee extends the service of the grand jury for a period of 6 months or less upon a determination that such extension is in the public interest. *At any time for cause shown, the Chief Judge or other judge designated by the Chief Judge may excuse a juror either temporarily or permanently*, and in the latter event the Chief Judge or designee may impanel another person in place of the juror excused.

D.C. Sup. Ct. R. Crim. P. 6(g) (emphasis added). Rufus G. King III, the Chief Judge of the Superior Court during the relevant time, submitted an affidavit stating that he "was never contacted by anyone from the Court's jury office or the U.S. Attorney's office before or at the time of the removal of grand juror Atherton." Affidavit of Rufus G. King III, J.A. 83. The affidavit also states that "[t]he practice then in place did not include contacting the chief judge before a grand juror was involuntarily dismissed. . . . I [later] changed the procedures to require that I be consulted before imposition of any grand jury discipline." *Id.*, J.A. 84.

B. *Proceedings Before the District Court*

Atherton alleges that as a result of the defendants' conduct, he was denied the right to complete his service on the grand jury and suffered humiliation, embarrassment, emotional trauma, and injury to his reputation. Compl. ¶¶ 27, 80. He commenced a *pro se* action in the District Court in April 2004, naming as defendants the District of Columbia Office of the Mayor, the Superior Court Office of the Clerk, Superior Court Clerk Duane Delaney, Director of Special Operations Division Roy Wynn, Juror Officer Suzanne Bailey-Jones, the Department of Justice Office of the Attorney General, and Assistant United States Attorney Daniel M. Zachem. The District Court substituted the District of Columbia as the proper defendant for the Office of the Mayor and the Superior Court Clerk's Office. *Atherton*, 2007 WL 1041659, at * 1 n. 1. The complaint alleged civil rights violations under 42 U.S.C. §§ 1983, 1985(3), and 1986, and *Bivens*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, as well as a common law fraud claim. Atherton asked for "actual damages equal to the amount of money he would have earned had he completed his 25 day jury service," as well as punitive damages. Compl. ¶ 79.

The District Court initially dismissed the case *sua sponte* for lack of subject matter jurisdiction. On June 21, 2005, this court reversed and remanded the case to the District Court. *Atherton v. District of Columbia Office of the Mayor, et al.*, No. 04-5268 (D.C. Cir. June 21, 2005) (Order). Beginning in

September 2006, defendants filed motions to dismiss and to quash service.

In an opinion issued on April 5, 2007, the District Court granted the defendants' motions to dismiss. *Atherton*, 2007 WL 1041659. The District Court first rejected the defendants' claims of improper service and statute of limitations bar as grounds for dismissal. *Id.* at *2. The Court then held, without explanation, that the complaint provided no basis for § 1985(3) liability, and that the § 1986 claim was time-barred. *Id.* at *3.

The District Court dismissed the official capacity claims brought under § 1983 against the municipality of D.C. on the ground that juror officer Bailey-Jones was acting outside the scope of her authority when she removed Atherton from the grand jury, *Id.* at *5, and dismissed the individual capacity claims against supervisors Delaney and Wynn on the ground that the allegations did not support any personal involvement by these defendants in the decision to remove Atherton from the grand jury, *Id.* at *3. The District Court declined to exercise supplemental jurisdiction over the fraud claim alleged against Wynn and Delaney. *Id.* at * 3 n. 2.

As for the fraud claim against Zachem, the District Court held that Atherton did not allege sufficient facts to rebut the government's certification that Zachem was acting within the scope of his employment, so the Federal Torts Claim Act was the exclusive remedy for the fraud

claim and the United States was substituted as the defendant. Because the United States is exempt from liability based on "[a]ny claim arising out of . . . misrepresentation [or] deceit," 28 U.S.C. § 2680(h), the fraud claim was barred by sovereign immunity. *Id.* at *7.

The District Court found that Atherton had stated viable claims against both Bailey-Jones and Zachem for deprivation of a liberty interest without due process and denial of equal protection. However, the District Court held that both defendants were entitled to absolute immunity and dismissed the § 1983 and *Bivens* claims against these defendants.

Atherton appealed the District Court's judgment dismissing his case. This court then appointed Professor James E. Coleman, Jr., of the Duke University School of Law, as *amicus curiae* to present arguments in favor of appellant ("*Amicus*"). *Atherton v. District of Columbia Office of the Mayor, et al.*, No. 07-5195 (D.C. Cir. Sept. 24, 2008) (Order). Professor Coleman was assisted by Sean E. Andrussier and third-year law students Sarah Campbell, James McDonald, Eugenie Montague, Emily Sauter, and Eric Wiener in Duke's Appellate Litigation Clinic. Sarah Campbell did a fine job in representing Atherton during oral arguments before this court.

II. ANALYSIS

A. *Standard of Review*

We review a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)*de novo*. *See Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008). A plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Fed. R. Civ. P. 8(a)(2). A complaint must give the defendants notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson*, 551 U.S. at 94, 127 S. Ct. 2197 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (other citations omitted). A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that . . . recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 (internal quotation marks and citation omitted). "So long as the pleadings suggest a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief,' a court may not dismiss." *Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009) (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). However, the Supreme Court recently made it clear that,

> [w]here the claim is invidious discrimination . . . the plaintiff must plead . . . that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action "because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.

Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009) (internal quotation marks and citations omitted). This means that,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. at 1949 (internal quotation marks and citations omitted).

A *pro se* complaint, such as Atherton's, "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson*, 551 U.S. at 94, 127 S. Ct. 2197 (internal quotation marks and citation omitted). But even a *pro se* complainant must plead "factual matter" that permits the court to infer "more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950.

B. *Absolute Immunity*

When government "officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it." *Forrester v. White*, 484 U.S. 219, 223, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). Because "the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have," judges are protected by absolute judicial immunity. *Id.* at 226, 108 S. Ct. 538. As the Court made clear in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1871), judges "are not liable to civil actions for their judicial acts, even when such acts are

in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Id.* at 351. "If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication." *Forrester*, 484 U.S. at 226-27, 108 S. Ct. 538 (citation omitted). However, as a general matter, the Supreme Court has "been quite sparing in its recognition of claims to absolute official immunity," to ensure against extending "the scope of the protection further than its purposes require." *Id.* at 224, 108 S. Ct. 538.

Judicial immunity from liability, as with absolute immunity in other contexts, "is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227, 108 S. Ct. 538. In other words, "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz v. Economou*, 438 U.S. 478, 511, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). It is therefore unsurprising that absolute immunity has been extended to cover executive branch officials who perform either quasi-judicial functions that are " 'functionally comparable' to th[ose] of a judge," *Id.* at 513, 98 S. Ct. 2894 (citing hearing examiners and administrative law judges), or prosecutorial functions "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

The courts have continued to apply "a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment." *Forrester*, 484 U.S. at 224, 108 S. Ct. 538. Following this approach, absolute immunity has been granted to a court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994); clerks of the court accused of issuing a false order against a *pro se* plaintiff barring his access to the court, *Sindram v. Suda*, 986 F.2d 1459 (D.C. Cir. 1993); probation officers alleged to have improperly investigated and prepared a presentence report, *Turner v. Barry*, 856 F.2d 1539 (D.C. Cir. 1988); and a court-appointed committee monitoring the unauthorized practice of law, *Simons v. Bellinger*, 643 F.2d 774 (D.C. Cir. 1980). However, absolute immunity has been rejected for judges acting in an administrative capacity, *Forrester*, 484 U.S. at 229, 108 S. Ct. 538; court reporters charged with creating a verbatim transcript of trial proceedings, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993); prosecutors providing legal advice to the police, *Burns v. Reed*, 500 U.S. 478, 492-96, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); and a judge engaged in the selection of jurors, *Ex Parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879).

As this court noted in *Wagshal*, "[w]e have distilled the Supreme Court's [functional] approach to quasi-judicial immunity into a consideration of three main factors." *Wagshal*, 28 F.3d at 1252. These factors include:

> (1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct.

Id. (citing *Butz*, 438 U.S. at 512, 98 S. Ct. 2894) (other citation omitted).

"The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." *Imbler*, 424 U.S. at 422-23, 96 S. Ct. 984 (footnote omitted). Like judicial immunity, absolute prosecutorial immunity turns on the function performed by the prosecutor. Absolute immunity is granted only for conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430, 96 S. Ct. 984. Thus, courts look to whether the particular activity in dispute was performed by a prosecutor in his or her official capacity as an advocate for the state in the course of judicial proceedings. *See Kalina v. Fletcher*, 522 U.S. 118, 125, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). A prosecutor is not entitled to absolute immunity when performing "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

"[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns*, 500 U.S. at 486, 111 S. Ct. 1934. "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87, 111 S. Ct. 1934. For the reasons explained below, we hold that neither Bailey-Jones nor Zachem is entitled to absolute immunity from liability on the due process and equal protection claims raised by Atherton. The issues in this case are distinct from—and thus do not require us to decide—questions concerning whether judges and prosecutors have absolute immunity for exercising or ruling on peremptory challenges or challenges for cause at trial.

1. *Juror Officer Bailey-Jones is Not Entitled to Quasi-Judicial Immunity*

The District argues that Bailey-Jones is entitled to absolute immunity because, as a juror officer of the Superior Court, she performed tasks " 'that are basic and integral parts of the judicial function. . . .' " D.C. Br. at 9 (quoting *Sindram*, 986 F.2d at 1461). We disagree.

Bailey-Jones's act of dismissing Atherton from the grand jury was not an exercise of a judicial function, nor was it "integrally related to adjudication." *Wagshal*, 28 F.3d at 1253. She was not involved in the resolution of any factual or legal issue; and her responsibilities did not involve handling any pleadings, disputes, or controversies of law. In fact, Bailey-Jones's role in

Atherton's dismissal was entirely removed from the adjudicative context. The juror officer is primarily responsible for administrative tasks, such as determining the number of jurors needed by the Superior Court each day, managing the computer systems and equipment for the Juror's Office, and overseeing juror orientation and the administration of the oath for jurors. *See* Juror Officer Job Description, J.A. 71-76. The juror officer also "[r]eviews written requests for juror excuses or deferrals" and grants or denies such requests "in conformity with policies established by the court." *Id.*, J.A. 72. These administrative and managerial activities, even if essential to the smooth and efficient functioning of Superior Court operations, are not functions that justify the application of quasi-judicial immunity. "[T]he touchstone for the ... applicability [of judicial immunity] has been performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights. When judicial immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges—that is, because they, too, exercise a discretionary judgment as a part of their function." *Antoine*, 508 U.S. at 435-36, 113 S. Ct. 2167 (internal quotation marks and citations omitted).

The District concedes that Bailey-Jones was performing an administrative act when she dismissed Atherton, but is nonetheless entitled to absolute immunity because her actions were "taken in furtherance of a judicial function." D.C. Br. at 10. This argument

fails. The "functional approach" does not allow for the extension of absolute immunity merely because a public official performs an act that is arguably "part of the judicial function." *Antoine*, 508 U.S. at 435, 113 S. Ct. 2167 (rejecting the claim that absolute immunity should be extended to court reporters). Indeed, certain activities performed by public officials may be "quite important in providing the necessary conditions of a sound adjudicative system," but remain "not themselves judicial or adjudicative" in nature. *Forrester*, 484 U.S. at 229, 108 S. Ct. 538.

Moreover, Bailey-Jones's argument that she is entitled to absolute immunity cannot be reconciled with *Ex Parte Virginia*, 100 U.S. 339, 25 L. Ed. 676. In that case, the Supreme Court held that a judge's selection and exclusion of persons for jury service was not a judicial function entitled to absolute immunity. The Court held:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . [I]t surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act. . . . That the jurors are selected for a court makes no difference.

> So are court-criers, tipstaves, sheriffs, & c. Is their election or their appointment a judicial act?

Id. at 348.

Ex Parte Virginia was cited with approval in *Forrester*, where the Court stated that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts." *Forrester*, 484 U.S. at 228, 108 S. Ct. 538. The *Forrester* Court went on to say:

> In *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts.
>
> . . . .
>
> Although [*Ex Parte Virginia*] involved a criminal charge against a Judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance.

Forrester, 484 U.S. at 228, 108 S. Ct. 538.

The District attempts to distinguish *Ex Parte Virginia*, claiming that it involved "the ministerial act of drawing up a list of potential jurors, which could have

been done by anyone," while in this case "Bailey-Jones had to decide whether or not to excuse Mr. Atherton based on his reported disruptive behavior, an act which . . . was solely entrusted to the Court." D.C. Br. at 12 n. 6. This contention has no merit. Whether an act is "solely entrusted to the Court" is not the test to determine whether it is a "judicial function" for purposes of absolute immunity. The court reporter in *Antoine* was engaged in acts solely entrusted to the court, but those acts did not entitle the court reporter to absolute immunity.

In assessing Bailey-Jones's claim for absolute immunity, we must also consider "whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect." *Wagshal*, 28 F.3d at 1252. It is arguably conceivable that the threat of litigation might inhibit a juror officer's ability to make some decisions necessary for the "smooth operation" of grand jury proceedings. But the District concedes that the need to excuse a juror rarely arises. D.C. Br. at 13. Therefore, there is no evidence in this case that rejecting absolute immunity will impede independent and responsible decisionmaking by juror officers in the future. *See Antoine*, 508 U.S. at 437, 113 S. Ct. 2167 ("Respondents have not provided us with empirical evidence demonstrating the existence of any significant volume of vexatious and burdensome actions against reporters. . . ."). Furthermore, qualified immunity should more than suffice to protect juror officers and other like public officials in the Superior Court. *See Cleavinger v. Saxner*, 474 U.S. 193, 207-08, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985).

Finally, we must assess "whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct." *Wagshal*, 28 F.3d at 1252. In *Butz*, the Supreme Court noted:

> [T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

438 U.S. at 512, 98 S. Ct. 2894. There were no such "safeguards" available to Atherton when he was summarily dismissed from grand jury service.

In sum, it is clear that Bailey-Jones was performing administrative/managerial functions when she dismissed Atherton from the Superior Court grand jury. The District has failed to meet its burden to show that the acts performed by Bailey-Jones were quasi-judicial functions that were functionally comparable to those of a judge. Therefore, the District Court erred in dismissing Atherton's claims against Bailey-Jones on the ground that she is entitled to absolute immunity.

2. *Supervising AUSA Zachem is Not Entitled to Absolute Prosecutorial Immunity*

Unlike Bailey-Jones, who is employed by the District of Columbia, Zachem is a federal employee. However, "the law of immunity in a *Bivens* claim against a federal official mirrors that in a section 1983 claim against a state official." *Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995) (citing *Butz*, 438 U.S. at 504, 98 S. Ct. 2894). Absolute prosecutorial immunity, like judicial immunity, turns on the function performed by the prosecutor. And not all work done by prosecutors is covered by absolute immunity. *See Kalina*, 522 U.S. at 125, 118 S. Ct. 502 (noting that absolute immunity does not encompass some of the official activities of a prosecutor).

As noted above, prosecutors are entitled to absolute immunity for conduct "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S. Ct. 984. The Supreme Court has explained

that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which *occur in the course of his role as an advocate for the State*, are entitled to the protections of absolute immunity." *Kalina*, 522 U.S. at 126, 118 S. Ct. 502 (citing *Buckley*, 509 U.S. at 273, 113 S. Ct. 2606) (emphasis added). But "the defense [is] unavailable when the prosecutor was performing a different function." *Id.* (citing prosecutors' provision of legal advice to the police during their pretrial investigation of the facts, holding a press conference, and allegedly fabricating evidence concerning an unsolved crime as acts that are not covered by prosecutorial immunity).

In this case, Zachem is alleged to have procured or participated in the unlawful removal of a sworn grand juror. His conduct certainly was not "intimately associated with the judicial phase of the criminal process." And it surely did not "occur in the course of his role as an advocate for the State." Indeed, Zachem's conduct was not comparable to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity: His role in Atherton's dismissal from the grand jury was not related to a decision whether to prosecute an individual, *Imbler*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128; it did not involve his participation in a probable cause hearing, *Burns*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547; it was not a presentation of the state's case at trial, *see Buckley*, 509 U.S. at 273, 113 S. Ct. 2606; and it did not concern

the evaluation or selection of evidence for presentation to a grand jury, *Kalina*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471.

Simply because a prosecutor's conduct is connected with the grand jury does not make it advocatory. Prosecutorial immunity undoubtedly may extend to cover prosecutors' conduct before grand juries, *see, e.g.*, *Burns*, 500 U.S. at 490, 111 S. Ct. 1934 (noting immunity at common law extended to prosecutors participating in "any hearing before a tribunal which performed a judicial function") (quotation marks and citation omitted); *Id.* at 490 n. 6, 111 S. Ct. 1934 (citing cases involving grand juries). In this case, however, Zachem was not the AUSA who was presenting evidence to the grand jury. He was the supervising AUSA who was called in to address complaints raised by members of the grand jury who were allegedly annoyed with Atherton's behavior during grand jury deliberations. Indeed, Zachem acknowledged that he did "not think it appropriate for the U.S. Attorney's Office . . . to take a position with respect to the removal of a particular juror from service," Zachem email, J.A. 62, so he knew that his involvement had nothing to do with his advocatory duties as a prosecutor. Atherton's dismissal could have been performed by *anyone*. It had nothing to do with Zachem's advocatory functions.

This determination is not inconsistent with the Supreme Court's recent decision in *Van de Kamp v. Goldstein*, __ U.S. __, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009), where the Court held that administrative

activities conducted by a supervising prosecutor which were "directly connected with the prosecutor's basic trial advocacy duties" may be protected by absolute immunity. *Id.* at 863. *Van de Kamp* involved a lawsuit by a criminal defendant, who alleged, among other things, that the supervising prosecutor's failure to train and supervise attorneys under his charge resulted in a prosecutor improperly withholding impeachment evidence which deprived the defendant of a fair trial. The principal claim in the case was the alleged withholding of trial evidence, a claim with respect to which prosecutors have long enjoyed the protection of absolute immunity. The Supreme Court held that it would be anomalous to deny immunity to a supervising prosecutor for failure to train when the trial prosecutor—whose "error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim"—would be entitled to absolute immunity protection. *Id.* at 862. It is plain that the Court's analysis in *Van de Kamp* is inapposite here. In this case, Zachem's alleged activities—improperly removing a grand juror on the basis of his ethnicity and/or for the content and quality of his deliberations—had nothing to do with a prosecutor's preparation for or participation in a criminal trial.

In sum, Zachem is not entitled to absolute immunity because the activities for which he is being sued do not relate to his performance as an advocate for the government. As discussed above in relation to Bailey-Jones, the final two factors of the immunity inquiry, *see Wagshal*, 28 F.3d at 1252, do not change this

outcome. Zachem did not demonstrate that "the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect," *id.*, and the absence of safeguards in this case counsels against extending absolute immunity to those involved.

C. *Atherton's Equal Protection Claims: §§ 1983 and 1985(3)*

The District Court found that Atherton's complaint and supporting submissions viably stated claims of equal protection violations by Bailey-Jones and Zachem. Atherton's right not to be excluded from a grand jury on the basis of race or ethnicity was clearly established when he was dismissed from the Superior Court grand jury. *See Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 329, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970) (noting that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion"); *Campbell v. Louisiana*, 523 U.S. 392, 398, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998) (stating that there is a well-established equal protection right not to be excluded from grand jury service on the basis of race). Appellees do not contest this point. Rather, appellees contend that Atherton failed to state claims under the equal protection clause against Bailey-Jones and Zachem. We agree.

The only factual allegations in Atherton's complaint on his equal protection claim are that: (1) after a witness

who could not speak English testified before the grand jury, Atherton openly thanked the witness in Spanish, Compl. ¶¶ 64-65; (2) "based on information, Atherton was the only semi-fluent Spanish speaking grand juror," *Id.* at ¶ 67; and (3) Atherton is "half Mexican," *Id.* From these facts, Atherton alleges that, "based upon information," his removal without cause from the grand jury was an act of discrimination against him "and Hispanics in particular because there were no other Hispanics on the jury." *Id.* at ¶ 73. He also alleges that the defendants conspired to illegally remove him from the grand jury "for ethnic purposes." *Id.* at ¶ 68. These spare facts and allegations are not enough to survive a motion to dismiss under *Iqbal* and *Twombly.* The complaint and supporting materials simply do "not permit the court to infer more than the mere possibility of misconduct," *Iqbal*, 129 S. Ct. at 1950, and this is insufficient to show that Atherton is entitled to relief. *See* Fed. R. Civ. P. 8(a)(2). As the Court noted in *Iqbal*, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citation omitted). We therefore reverse the District Court's finding that Atherton stated claims of equal protection violations by Bailey-Jones and Zachem.

Atherton's claims under § 1985(3) fare no better. Section 1985(3) provides a cause of action against two or more persons who participate in a conspiracy motivated by class-based discriminatory animus. 42 U.S.C. § 1985(3); *see also Griffin v. Breckenridge*,

403 U.S. 88, 96-102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971) (examining the meaning of § 1985(3)). To state a claim under § 1985(3), Atherton was required to allege:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States.

Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987) (alteration in original). "The statute does not apply to *all* conspiratorial tortious interferences with the rights of others, but only those motivated by some class-based, invidiously discriminatory animus." *Id.* (internal quotation marks and citation omitted).

Atherton's complaint and supporting materials merely allege that Zachem, Bailey-Jones, and Wynn communicated about his removal before he was dismissed from the grand jury. *See* Zachem email, J.A. 61-62. These bare facts clearly do not raise an inference that Zachem, Bailey-Jones, and Wynn were conspiratorially motivated by some class-based, invidiously discriminatory animus. The complaint also asserts that the defendants "conspired under color of law to illegally remove Atherton . . . for ethnic purposes," Compl. ¶ 68, and that Atherton was illegally removed from the grand jury in violation of the Constitution and

D.C. law. But these "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a cause of action under § 1985(3). *Iqbal*, 129 S. Ct. at 1949. We therefore affirm the District Court's dismissal of Atherton's § 1985(3) claims.

D. *Atherton's Due Process Claims and Qualified Immunity*

Although government officials may be sued in their individual capacities for damages under § 1983 and *Bivens*, qualified immunity protects officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). When determining whether a right was "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The District Court did not decide whether Bailey-Jones or Zachem are entitled to qualified immunity.

Traditionally, courts have approached the qualified immunity analysis through a two-step inquiry mandated in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), asking, first, whether the alleged facts show that the individual's conduct violated a statutory or constitutional right, and, second, whether

that right was clearly established at the time of the incident. *Id.* at 200, 121 S. Ct. 2151. However, the Supreme Court recently announced that the *Saucier* protocol "should no longer be regarded as mandatory." *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009). Rather, a district court judge now retains discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.*

Whether the defendants in this case are entitled to qualified immunity on the due process claim is a challenging question. Atherton alleges he was denied due process in violation of the Fifth Amendment of the Constitution. *See Butera v. District of Columbia*, 235 F.3d 637, 645 n. 7 (D.C. Cir. 1987) (explaining that while due process violations are typically analyzed under the Fourteenth Amendment, the District of Columbia—which is not a state—is subject to the Due Process Clause of the Fifth Amendment). The Fifth Amendment Due Process Clause protects individuals from deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. V. A procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections. Liberty interests may either be located in the Constitution itself or "may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). "State regulations may give rise to a constitutionally protected

liberty interest if they contain substantive limitations on official discretion, embodied in mandatory statutory or regulatory language." *See Price v. Barry*, 53 F.3d 369, 370 (D.C. Cir. 1995) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Although the District Court found that there was a liberty interest in grand jury service, the court did not explain the source of the liberty interest, its parameters, or the particular portions of Atherton's allegations which stated a due process claim. Much hinges on these determinations, because the qualified immunity analysis "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639, 107 S. Ct. 3034. The Supreme Court has explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of

> virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Id.; *see also Butera*, 235 F.3d at 646. The Court has cautioned, however, that "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034 (internal citation omitted).

Amicus, on behalf of Atherton, argues that D.C. law limits official discretion to remove a sworn grand juror and pointed to several possible sources of the liberty interest. For example, the D.C. Superior Court Rules of Criminal Procedure provide that a grand juror may be dismissed at any time by the Chief Judge, or another appointed judge, *for cause shown*. D.C. Sup. Ct. R. Crim. P. 6(g) (emphasis added). Additionally, counsel for the District agreed at oral argument that a juror has a recognized interest in not being dismissed because of his or her "views on the merits" and that this right was clearly established under D.C. law; but he argued that Atherton's complaint does not advance the claim. Whether this or any other source of District of Columbia law creates a liberty or property interest is a matter that must be addressed by the District Court on remand.

As noted above, the District Court retains the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first"—(1) whether the alleged facts show that the officials' conduct violated a statutory or constitutional right and (2) whether that right was clearly established at the time of the incident—"in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

"Once it is determined that due process applies, the question remains what process is due." *FDIC v. Mallen*, 486 U.S. 230, 240, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). "[A] fundamental requirement of due process is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (internal quotation marks and citation omitted). "In determining whether due process requirements have been satisfied—whether an appropriate hearing has been provided at a meaningful time and in a meaningful matter—a court should consider: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1282 (4th Cir. 1995) (citing the Supreme Court's

seminal decision in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). It is not always clear, however, whether and to what extent a predeprivation hearing is required or whether a post-deprivation hearing will suffice. *See, e.g., Mallen*, 486 U.S. at 240, 108 S. Ct. 1780. Furthermore, whether it be pre or post-deprivation, "[t]he question of 'what process is due' is more easily asked than answered." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998).

In assessing a qualified immunity defense to a due process claim, a court invariably must consider the context and weigh the *Mathews* factors. And

> notwithstanding the fact that procedural due process rights oftentimes will not be "clearly established" within the meaning of *Harlow* and *Anderson*, [a court] must consider the specific facts of [the] case to determine whether it presents one of those occasions in which the rights are clearly established. The question presented therefore boils down to this: Has [the complainant] proven that, under the three-part balancing analysis of *Mathews* and the precedents that have applied it, he had a "clearly established" right to process more comprehensive than that provided by the District?

Brewster, 149 F.3d at 984.

In this case, it is possible that any constitutionally required process may be found in the law that gives content to the liberty interest. In other words, the process required by the substantive law may coincide with the constitutional minimum. For example, D.C. Superior Court Rule of Criminal Procedure 6(g) prescribes a procedure to be followed when persons are removed from jury service: a juror may only be removed by the Chief Judge or another appointed judge for cause shown. Atherton alleges that he was deprived of even this process.

Because the qualified immunity issue was not addressed below and was only thinly briefed on appeal, we are not in a position to address the questions that remain to be answered here. We will leave it to the District Court on remand to consider these matters.

E. *The Claims Against the District of Columbia*

Finally, we affirm the District Court's dismissal of the § 1983 claims against the District of Columbia. "Under § 1983 a municipality is liable not under principles of *respondeat superior*, but only for constitutional torts arising from 'action pursuant to official municipal policy.'" *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)); *see also Iqbal*, 129 S. Ct. at 1948. The facts alleged by Atherton do not support an inference of a course the city's "policymakers consciously chose to pursue." *Triplett*, 108 F.3d at 1453.

Appendix A

III. CONCLUSION

The judgment of the District Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED APRIL 5, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 04-0680(HHK).

PETER JAMES ATHERTON,

Plaintiff,

v.

DISTRICT OF COLUMBIA OFFICE OF THE MAYOR et al.,

Defendants.

April 5, 2007.

MEMORANDUM OPINION

HENRY H. KENNEDY, JR., United States District Judge.

In this civil rights action filed *pro se*, plaintiff challenges his removal on April 11, 2001, from a grand jury convened in the Superior Court of the District of Columbia. He names as defendants the District of Columbia Office of the Mayor, the Superior Court Office of the Clerk, Superior Court Clerk Duane Delaney,

Director of Special Operations Division Roy Wynn and Jury Officer Suzanne Bailey-Jones (collectively "the D.C. defendants"), as well as the Department of Justice Office of the Attorney General and Assistant United States Attorney ("AUSA") Daniel M. Zachem ("the federal defendants").[1]

Presently before the Court are the motions to dismiss brought separately on behalf of the District of Columbia, each named individual D.C. defendant and the federal defendants. In addition, plaintiff has pending a motion for default judgment. Because a default has not been entered against any defendant, plaintiff's motion for judgment based on default will be denied. Upon consideration of the defendants' respective motions, plaintiff's opposition and the entire record, the Court will grant defendants' motions to dismiss and will dismiss the case.

I. BACKGROUND

Plaintiff is a resident of the District of Columbia. He alleges that he was sworn to serve as a grand juror beginning April 9, 2001, for 25 days. When plaintiff sought to obtain information not provided to him in "a grand jury instruction book identifying crimes and their elements," he upset "a few grand jurors" because the

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1. Defendants rightly assert that the Office of the Mayor and the Superior Court Clerk's Office may not be sued separately from the District of Columbia. The Court hereby substitutes the District of Columbia as the proper defendant.

grand jury "had voted for indicting, albeit without knowing the elements of the charge [thereby necessitating] a new vote . . . once the elements of the charge were known." Compl. ¶¶ 17-20. On April 11, 2001, AUSA Zachem told plaintiff to report to Wynn immediately. *Id.* ¶ 22. He was then directed to Bailey-Jones' office "where he was summarily permanently dismissed, allegedly because he was disruptive." *Id.* ¶ 24. Plaintiff was paid for three days of service. *Id.* ¶ 31. He unsuccessfully sought written reasons for his removal from the grand jury. *Id.* ¶¶ 25, 28, 31. Plaintiff accuses defendants of fraud (Count 1) and civil rights violations (Count 2).

On April 9, 2004, the Office of the Clerk of this Court received plaintiff's complaint and motion to proceed *in forma pauperis*. On April 27, 2004, this Court granted plaintiff's motion to proceed *in forma pauperis* and then *sua sponte* dismissed the complaint for lack of subject matter jurisdiction. *See* Order (Apr. 27, 2004). By Order of June 21, 2005, the Court of Appeals for the District of Columbia Circuit reversed and remanded the case to the district court. *See* Dkt. No. 11 (Mandate) (Aug. 24, 2005). The case was assigned to the undersigned judge on August 4, 2006, and summonses were issued on August 11, 2006. Beginning in September 2006, defendants began to file motions to dismiss and to quash service. Plaintiff has opposed each motion.

Appendix B

II. DISCUSSION

The District of Columbia Defendants' Motions to Dismiss

The D.C. defendants advance common grounds for dismissal, two of which will be resolved with little discussion.

1. *Improper Service of Process*

Defendants seek dismissal for improper service of process, asserting that they were not served within 120 days of the filing of the complaint and that the individual defendants sued in their official and individual capacities were not personally served. Plaintiff's appeal of the dismissal order tolled the running of the time for service. In any event, plaintiff's proceeding *in forma pauperis* places the responsibility of proper service on this court's officers. *See* 28 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in [*in forma pauperis*] cases."). Accordingly, plaintiff should not and will not be penalized for any deficiencies in service of process.

2. *Statute of Limitations*

Defendants also seek dismissal on the ground that the complaint is barred by the District of Columbia's three-year statute of limitations. They reasonably base this claim on the date that the complaint was formally filed, April 27, 2004. Plaintiff rightly asserts, however,

that the complaint and his application to proceed *in forma pauperis* were presented to the Clerk's Office on April 9, 2004, as evidenced by the Clerk's received stamp appearing on the back of the original paper complaint located in the Clerk's jacket. The administrative delay between the submission of a complaint and its formal filing after the Court's granting of leave to proceed *in forma pauperis* is not attributable to the plaintiff. *See Washington v. White*, 231 F. Supp. 2d 71, 75-76 (D.D.C. 2002) (citing cases). The events forming the basis of the complaint occurred on April 11, 2001. Plaintiff's submission of the complaint to the Clerk's Office on April 9, 2004, constitutes a timely filing. Consequently, Defendants' arguments in support of their motion to dismiss based on the statute of limitations can not be sustained.

3. *Failure to State a Claim*

Delaney, Wynn and Bailey-Jones each assert that the complaint fails to state a claim upon which relief may be granted. A court may dismiss a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted if it appears, assuming the alleged facts to be true and drawing all inference in plaintiff's favor, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997), *cert. denied*, 531 U.S. 1147 (2001); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). In ruling on a motion to dismiss, the Court must liberally construe the complaint. It need not, however,

"accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal*, 16 F.3d at 1276.

Plaintiff brings his federal claim under 42 U.S.C. §§ 1983, 1985 and 1986. Compl. at 10. Section 1983 creates a cause of action against individuals who have violated "rights, privileges, or immunities secured by the Constitution and laws" while acting under color of state law. 42 U.S.C. § 1983. Section 1985 creates a cause of action against individuals who allegedly engaged in a conspiracy to violate civil rights. As will become apparent, the complaint provides no basis for § 1985 liability. And, the § 1986 claim is time-barred. Section 1986 extends liability to individuals who "neglect to prevent" such a conspiracy, provided that the action is "commenced within one year after the cause of action has accrued ." 42 U.S.C. § 1986. As discussed above, plaintiff filed this action nearly three years after its accrual. The Court turns next to the merits of the § 1983 claim.

Because § 1983 claims are against a defendant in his or her personal capacity, plaintiff must show that the defendant was personally and directly involved in the wrongful acts. *Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993). Recovery may not be based on a theory of *respondeat superior* or vicarious liability. *Graham v. Davis*, 880 F.2d 1414, 1421 (D.C. Cir. 1989) (citation omitted).

Appendix B

A. Plaintiff Fails to State a Clam Against Defendants Delaney and Wynn

Clerk Delaney is accused of having "defended Wynn [and] Bailey-Jones," Compl. ¶¶ 5, 42, and Director Wynn is accused of having "confirmed the dismissal and thereby continued the perpetration of the fraudulent authority."[2] *Id.* ¶ 41. These allegations do not support any personal involvement by Delaney and Wynn in the decision to remove plaintiff from the grand jury. Plaintiff therefore fails to state a claim upon which relief may granted against these defendants in their individual capacities. *See Cameron*, 983 F.2d 257-58 (dismissing claims against high-level policymakers "[i]n the absence of any allegations specifying [their] involvement").

A lawsuit for damages against "municipal officials in their official capacities is [ ] equivalent to a suit against the municipality itself." *Atchinson v. District of Columbia*, 73 F.3d 418, 424 (D.C. Cir. 1996) (internal citations omitted). Because the District of Columbia is also a party-defendant, the complaint against Delaney and Wynn in their official capacities is duplicative and therefore will be dismissed.

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2. In addition to the federal claim, plaintiff accuses these defendants of committing fraud by knowingly misrepresenting their authority to remove him from the grand jury when, in fact, "any purported authority for removal requires a decision by [the Superior Court Chief Judge] or his designee." Compl. ¶ 60. Because no federal claims will remain after this disposition, the Court declines to exercise supplemental jurisdiction over the common law claim.

Appendix B

B. Plaintiff States a Claim Against Defendant Bailey-Jones

Bailey-Jones and AUSA Zachem are the only named defendants directly implicated in plaintiff's removal. *See* Compl. ¶¶ 22-27. Plaintiff claims that these defendants denied him due process before depriving him of property and liberty interests, in violation of the Fifth Amendment. *See* Compl. ¶ 57. If such is the case, plaintiff would have been entitled at a minimum to notice and an opportunity to be heard. *UDC Chairs Chapter, American Ass'n of University Professors v. Board of Trustees of University of District of Columbia*, 56 F.3d 1469, 1471-72 (D.C. Cir. 1995) (citations omitted).

"Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Roth v. King*, 449 F.3d 1272, 1284 (D.C. Cir. 2006) (*quoting Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 2803 (2005)). The deprivation of a property interest arises to constitutional dimension only upon a showing that the individual had "a legitimate claim of entitlement" to the property, rather than an abstract need or desire for it. *Id.* (internal quotation marks omitted); accord *Doe by Fein v. Dist. of Columbia*, 93 F.3d 861, 868 (D.C. Cir. 1996); *Stewart v. Gaines*, 370 F. Supp. 2d 293, 295-96 (D.C. 2005). Plaintiff has not pointed to any source creating a valid property interest in jury service. He therefore has not stated a claim based on a property deprivation.

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In identifying a liberty interest, courts may look to the Constitution or statutory law. *Ellis v. District of Columbia*, 84 F.3d 1413, 1415 (D.C. Cir. 1996). There is no constitutional right to serve on a grand jury. If such a right exists under District of Columbia law, *see* D.C. Code §§ 11-1901, 1908, it is not without limitation. District of Columbia law authorizes the exclusion of "an individual summoned for jury service [if] his . . . service as juror would be likely to disrupt the proceedings," D.C. Code § 11-1908(b)(1), and provides that "[t]he procedures for challenges to and review of exclusions from jury service shall be set forth in the jury system plan." D.C. Code § 11-1908(c). Plaintiff alleges that "Bailey-Jones concurred" in his request "that the reasons for the disruption . . . be reduced to writing," Compl. ¶ 25, thereby suggesting some procedural protection. The Court cannot conclude that plaintiff can prove no set of facts to support his due process claim based on the deprivation of a liberty interest under District of Columbia law.

Plaintiff also speculates that he was removed because of his Hispanic origin based on the fact that he thanked a witness in Spanish in a "homicide case involving a Black-Hispanic altercation." Compl. ¶ 64. He alleges that "he was the only semi-fluent Spanish speaking grand juror and [ ] is in fact half Mexican." *Id.* ¶ 67. D.C. Code § 11-1903 prohibits exclusion from jury service "on account of race, color, religion, sex, national origin, ancestry, economic status, marital status, age, or (except as provided in this chapter) physical handicap." *Id.* Assuming the truth of plaintiff's

allegation, the Court determines that he has stated a claim under the equal protection clause of the Constitution sufficiently to survive a motion to dismiss. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128, 114 S. Ct. 1419, 1421 (1994) ("[P]otential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

C. Defendant Bailey-Jones is Entitled to Immunity

Bailey-Jones asserts that she is entitled to qualified and judicial immunity. Like judges, court officers are absolutely immune from a damages lawsuit for actions taken in their judicial or quasi-judicial capacity. *See Forrester v. White*, 484 U.S. 219, 225 (1988); *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993). This is so even if the action taken "was in error . . . or was in excess of [the employee's] authority." *Wagshal v. Foster*, 28 F.3d 1249, 1253 (D.C. Cir. 1994) (citations and internal quotation marks omitted); *see Sindram*, 986 F.2d at 1461 ("[I]mmunity applies to all acts of auxiliary court personnel that are 'basic and integral part[s] of the judicial function,' unless those acts are done 'in the clear absence of all jurisdiction.' ") (citations omitted).

It cannot be reasonably argued that Bailey-Jones was not performing tasks related to her position as jury officer in removing plaintiff from the grand jury. And,

there is no basis for finding that she was acting completely without jurisdiction. District of Columbia law permits the exclusion from jury service if the "juror would be likely to disrupt the proceedings." D.C. Code § 11-1908(b)(1). Plaintiff concedes that "a few grand jurors seemed upset" about his actions, Compl. ¶ 20, that he was dismissed "allegedly because he was disruptive," *Id.* ¶ 24, and that he "apologized to Bailey-Jones for any misperceived misconduct on his part. . . ." *Id.* ¶ 26. Moreover, plaintiff claims that Bailey-Jones' decision to remove him had stemmed from the complaints of other grand jurors that AUSA Zachem had "coordinated" and "communicated" to Bailey-Jones. *Id.* ¶ 34. Plaintiff's own admissions provide adequate support for Bailey-Jones' defense of absolute immunity.

D. Plaintiff Fails to State a Claim of Municipal Liability

A municipality, such as the District of Columbia, may be held liable under 42 U.S.C. § 1983 only when it is shown that the individual wrongdoer was acting pursuant to an unconstitutional policy, practice or custom promulgated or sanctioned by the municipality. *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004); *Daskalea v. District of Columbia*, 227 F.3d 433, 441 (D.C. Cir. 2000); *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997). "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."

Appendix B

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388 (1997) (emphasis and internal quotation marks in original).

Plaintiff argues that Bailey-Jones was acting outside the scope of her authority because the applicable statute authorizes removal only by a judge. *See* Pl.'s Opp. at 7-10. Defendant acknowledges "some ambiguity in . . . Section 11-1908(b)(1)," authorizing removal of a disruptive juror by the "Court." Bailey-Jones' Mot. at 9. This is of little significance here, however, because municipal liability may not be predicated on the unauthorized vicarious acts of municipal employees. *Graham v. Davis*, 880 F.2d 1414, 1420-21 (D.C. Cir. 1989). Plaintiff therefore has failed to state a § 1983 claim against the District of Columbia.

The Federal Defendants' Motion to Dismiss

The United States and AUSA Zachem raise the same procedural grounds for dismissal, *i.e.*, improper service and statute of limitations, as the District of Columbia defendants. Their motion to dismiss on these grounds will be denied for the reasons previously stated.

A. Defendant Zachem Was Acting Within the Scope of His Employment

Pursuant to 28 U.S.C. § 2679(d)(1), the Chief of the Civil Division of the United States Attorney for the District of Columbia has certified that AUSA Zachem was acting within the scope of his employment at the

time of the events forming the basis of the complaint. Fed. Def.'s Mot., Attach. Because the certification "constitute[s] *prima facie* evidence," *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006), plaintiff has the burden of proving the opposite "by alleging facts that, if true, would establish that the defendant[ ][was] acting outside the scope of [his] employment." *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003) (*citing Kimbro v. Velten*, 30 F.3d 1501, 1508-09 (D.C. Cir. 1994)). In determining whether a federal employee was acting within the scope of his employment, the Court applies the law of the District of Columbia, which is drawn from the *Restatement (Second) of Agency*. *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995); accord *Council on American Islamic Relations*, 444 F.3d at 663. "Although scope of employment is generally a question for the jury, it 'becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of the employment.' " *Council on American Islamic Relations*, 444 F.3d at 663 (*quoting Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. 1984) (collecting cases)); accord *Stokes*, 327 F.3d at 1216 ("Not every complaint will warrant further inquiry into the scope-of-employment issue.").

"[A]n employee's conduct falls within the scope of employment if: 1) it is of the kind of conduct he is employed to perform; 2) it occurs substantially within the authorized time and space limits; 3) it is actuated, at least in part, by a purpose to serve the master; and

4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master." *Majano v. U.S.*, 469 F.3d 138, 141 (D.C. Cir. 2006) (*citing Restatement (Second) of Agency* § 228 (1957)). The first three requirements are applicable here.

The first requirement encompasses conduct either "of the same general nature as that authorized or incidental to the conduct authorized." *Council on American Islamic Relations*, 444 F.3d at 664 (*quoting Haddon*, 68 F.3d at 1424) (internal quotation marks and emphases omitted). Plaintiff contends that Zachem acted beyond the scope of his prosecutorial duties when he allegedly "collected and coordinated grand juror complaints and acted in concert with Super. Ct. clerks to remove [him] from the grand jury." Pl.'s Response to Defendant's Replies Addressing Defendant's Dismissal Motions ("Pl.'s Sur-reply") [Dkt. No. 50] at 5. It is undisputed, however, that the alleged wrongdoing occurred during AUSA Zachem's performance of his official duties, *i.e.*, presenting evidence to the grand jury, and during normal business hours at Superior Court. The first and second requirements are satisfied. With respect to the third requirement, plaintiff's acknowledgment of being disruptive, or at least perceived as such, cuts in favor of the United States' position. It cannot be reasonably disputed that Zachem's motivation for notifying the jury office about reports of a disruptive juror was at least in part to "discharge his duty" as a prosecutor. *Council on American Islamic Relations*, 444 F.3d at 665.

Plaintiff simply has not alleged sufficient facts to rebut the government's certification that Zachem was acting within the scope of his employment. Accordingly, as to the fraud claim (Count 1) against the federal defendants, the Federal Tort Claims Act ("FTCA") is the exclusive remedy and the United States is substituted as the sole defendant. 28 U.S.C. § 2679(b)(1). Under the FTCA, Congress has specifically exempted the United States from liability based on "[a]ny claim arising out of . . . misrepresentation [or] deceit." 28 U.S.C. § 2680(h). Sovereign immunity therefore bars plaintiff's fraud claim against the federal defendants.

B. Defendant Zachem is Immune From the Individual-Capacity Lawsuit

The complaint against AUSA Zachem in his individual capacity for constitutional violations is cognizable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which is the federal counterpart to § 1983.[3] Zachem asserts that he is entitled to absolute immunity because at all relevant times he was performing his prosecutorial duties. Given the previously stated facts, the Court agrees. A prosecutor is absolutely immune from a damages lawsuit predicated on his "initiating a

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3. The FTCA's exclusive provision "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A); *see Carlson v. Green*, 446 U.S. 14, 19 (1980) ("Congress views FTCA and *Bivens* [remedies] as parallel, complementary causes of action.").

prosecution and [ ] presenting the State's case." *Imbler v. Pachtman* 424 U.S. 409, 430-431 (1976); *see Moore v. Valder*, 65 F.3d 189, 193-4 (D.C. Cir. 1995) ("Advocatory conduct protected by absolute immunity 'include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.' ") (*quoting Buckley v. Fitzsimmons*, 509 U.S. 259 273, 113 S. Ct. 2606, 2615 (1993)).

CONCLUSION

For the foregoing reasons, the defendants' respective motions to dismiss are granted. A separate Order accompanies this Memorandum Opinion.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 25, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5195

September Term 2008

04cv00680

Filed On: August 25, 2009

Peter James Atherton,

Appellant

v.

District of Columbia Office of the Mayor, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards and Williams, Senior Circuit Judges

Appendix C

ORDER

Upon consideration of appellee Zachem's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D — COMPLAINT DATED APRIL 9, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO.
THIS ISSUE INVOLVES CIVIL RIGHTS
individually & in official capacity

PETER JAMES ATHERTON2 Mass Ave., NE, #2337 Washington, D.C. 20013-2337 Pgr. 202-424-2000,

Plaintiff,

vs.

DISTRICT OF COLUMBIA (D.C.)OFFICE OF THE MAYOR via CORPORATION COUNSEL 1350 Pennsylvania Ave., N.W. Room #409, Washington, D.C. 20004 Attn: Robert Spagnoletti Ph. 202-727-3400

- and -

SUPERIOR COURT OF D.C.OFFICE OF THE CLERK OF COURT 500 Indiana Ave. NW Room 2500 Washington, D.C. 20001 Ph. 202-879-1400

- and –

DUANE DELANEYClerk, Superior Court of D.C.500 Indiana Ave., N.W. Room 2500 Washington, D.C. 20001 Ph. 202-879-1400

Appendix D

PARTIES

1. Plaintiff Atherton is a resident of D.C. and was a Sworn Super. Ct. selected grand juror with April 1, 2001 Grand Jury, beginning April 9, 2001. Based upon information, Atherton alleges in para. 2-7 these statements;

2. Defendant District of Columbia is a "municipality" for civil rights litigation purposes & to the extent that judicial personnel work for D.C., they are a named party.

3. To the extent that Super. Ct. is a "municipal" court liable for judicial personnel, the court is a named defendant.

4. Dept. of Justice (DOJ) is Zachem's employer (in 2001) and they are being notified of the lawsuit & named a party.

5. Dfd. Clerk Delaney defended Wynn & Baily-Jones and is a named party.

6. Roy Wynn is a juror Special Operations Director & is the final policy maker for jury discipline.

7. Dan Zachem is an Asst. Atty. for the U.S. and was involved with grand jury matters.

Appendix D

RECUSAL DETERMINATION

8. To the extent that three Super. Ct. judicial personnel are party defendants, Atherton respectfully requests the recusal considerations be addressed concerning personnel involved with processing pleadings, jurors and every other matter, including DOJ conflicts.

REQUEST FOR LEGAL HELP

9. Atherton respectfully requests the appointment of constitutionally competent legal help to argue the law and prosecute this case because of his poverty.

ADMINISTRATIVE REMEDY EXHAUSTION

10. Atherton submitted a timely administrative claim to the D.C. Mayor dated 10/9/2001.

11. The claim was denied 11/20/2001 and discovered in December 2003.

TAINTED INDICTMENTS

12. Atherton alleges that there exist indictments and presentments possibly tainted by grand jury misconduct from April #1, 2001 Grand Jury. This issue is beyond the scope of this action and is stated for this Honorable court's information & action.

Appendix D

FACTS

13. Atherton repeats and realleges the statements in para. 1-12.

14. The alleged unlawful/illegal conduct occurred in D.C.

15. When Atherton sought information about Wynn & Bailey-Jones's responsibility & authority, Super. Ct. Atty. V. Cawood denied the freedom of information act request on 1/30/2004.

16. Grand Jury April #1, 2001 was impanelled & sworn 4/9/2001 and was scheduled to deliberate for 25 days.

17. Grand jurors were provided a grand jury instruction book identifying crimes and their elements.

18. Various Asst. U.S. Attys. (AUSA) sought indictments on charges which were not in the grand jury instruction book available to grand jurors.

19. Atherton obtained the foreman's concurrence to obtain the missing information from the AUSA.

20. A few grand jurors seemed upset because the grand jury (a minimum of 12) had voted for indicting, albeit without knowing the elements of the charge, and a new vote would be needed once the elements of the charge were known.

Appendix D

21. A delay occurred in deliberations while the AUSA complied with the foreman's requests.

22. Effective 4/11/2000, AUSA Zachem entered the grand jury room and essentially told Atherton that he should report to Wynn immediately.

23. Atherton's grand jury notes were confiscated and Atherton, feeling intimidated, and yet relying on Zachem's official govt. status and presumed authority & good faith dealing reported to the grand jury office in Super. Ct.

24. Atherton was directed to Bailey-Jones' office where he was summarily permanently dismissed, allegedly because he was disruptive.

25. Atherton asked that the reasons for the disruption, which were not provided at the time, be reduced to writing, to which Bailey-Jones concurred.

26. Atherton apologized to Bailey-Jones for any misperceived misconduct on his part and presumed that Bailey-Jones had the authority to dismiss, which she stated that she had.

27. Relying upon the official status held by Zachem & Bailey-Jones and their representations, Atherton left feeling very humiliated, embarrassed and questioning his self worth, and did not return to grand jury duty.

28. In May, 2001 after not having received the written reasons for the dismissal, Atherton phoned Bailey-Jones & Wynn, neither of whom would answer their phone, seeking the status of the written basis of disruption because Atherton was never permitted the opportunity to defend himself.

29. Wynn, & based upon information Super. Ct. Atty. Cawood, returned Atherton's phone call verifying the dismissal without giving the reasons for the disruption.

30. Prior to filing this lawsuit, Atherton sought K. Huggins' help from the Multi Door Dispute Resolution Office in Super. Ct.

31. Huggins Agreed to informally approach Wynn, whereby Wynn a) agreed to pay Atherton for three days jury duty, and b) when requested to provide the reasons in writing for the dismissal, he said that Atherton had been referred to Super. Ct. attorney V. Cawood for the Answers (see para. 15).

COUNT 1 – FRAUD

32. Atherton repeats and realleges the statements in para. 1-31.

33. Atty Zachem allegedly participated/coordinated AUSA efforts seeking grand jury indictments.

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34. Atherton alleges that Zachem, with conflicting interests, also coordinated grand juror complaints About Atherton's alleged disruption without consulting with plaintiff.

35. Based upon information, Atherton was alleged to disrupt grand jury proceedings when he delayed grand jury deliberations by seeking jury instructions missing from the grand jury instruction book.

36. Based upon information, Zachem allegedly communicated this alleged disruption to Wynn And/or Bailey-Jones.

37. Thereafter, as previously explained, Zachem, Bailey-Jones & later Wynn & Delaney participated in the removal and/or certification of the removal of Atherton from the grand jury, Zachem's action being prosecutorial misconduct.

38. Atherton alleges that Zachem had no authority to coordinate grand juror complaints against another grand juror while participating himself directly/ indirectly in efforts to obtain grand jury indictments.

39. Atherton alleges that Zachem fraudulently misrepresented that authority to essentially induce Atherton under color of law, custom or usage to leave the grand jury proceedings.

Appendix D

40. Atherton alleges that Bailey-Jones blatantly told Atherton that she had the authority to dismiss him from the grand jury and there-after dismissed him as previously explained.

41. Wynn later confirmed the dismissal as previously explained and thereby continued the perpetration of the fraudulent authority.

42. Atherton alleges that Clerk Delaney wrote a letter to the corporation counsel as a result of the claim defending Wynn & Bailey-Jones in November 2001, thereby condoning the removal and the manner of the removal.

43. Atherton alleges that Clerk Delaney participated in the conspiracy to usurp authority fraudulently for purposes of removing Atherton from the grand jury.

44. Since Atherton has never been formally or informally provided with specific basis for the alleged disruption, he has therefore never been able to defend himself.

45. From information that Atherton has obtained separate from the court or AUSA, together with what he remembers, he has assembled a deduced analysis of what happened.

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46. Atherton alleges that there is no authority For judicial personnel to involuntarily dismiss without due process of law a grand juror permanently from the grand jury.

47. Atherton alleges that the practice of dismissing jurors is a custom or method of usage available under color of law in April 2001 And was the way policy was enforced, albeit illegally.

48. Based upon information, Chief Judge King was never informed of this incident and did not authorize the methods used.

49. In summary, Atherton alleges that defendants Zachem, Bailey-Jones, Wynn and Delaney in their individual and/or official capacities knowingly misrepresented their authority and removed and/or confirmed the removal of Atherton from the grand jury by deceiving him with bad faith assertions of disruptive behavior under color of law which, Atherton relied on in good faith, causing damages.

50. To the extent that it is permitted, D.C., Super. Ct. & DOJ are to be held liable for the actions of their employees.

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COUNT 2 – CIVIL RIGHTS VIOLATIONS 42 USC §1983, 1985, 1986

51. Atherton repeats & realleges the statements in para. 1-50.

52. Atherton alleges that he has rights, privileges and immunities Constitutionally and statutorily bestowed upon him while he is a sworn grand juror.

53. Atherton alleges that he has a right to be qualified and selected at random to be a juror.

54. Atherton alleges that when he is summoned, selected and sworn to be a grand juror, that he has become a "conscripted" employee with Constitutional and statutory rights, duties, obligations, liberty, property and other interests in continuing to participate in the grand jury process until the jury is dismissed.

55. Atherton alleges that once a citizen is summoned, he is required under penalty of law to report for jury service.

56. Atherton alleges that a grand jury summoned by Super. Ct. is eligible to entertain charges against defendants in either Super. Ct. or federal U.S. District Court and is a Constitutional entity theoretically independent of the three branches of government.

57. There is no Constitutional provision to remove a grand juror.

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58. Atherton alleges that any statutory provision or rule of court that provides for the removal of a deliberating juror requires a showing of cause in accordance with due process of law.

59. Specifically, Atherton alleges that procedural due process of law places the burden upon the person who dismisses to inform the person dismissed of the basis for the removal and to provide an opportunity to respond, which burden fell to the defendants & which they failed to do.

60. Atherton alleges that any purported authority for removal requires a decision by a Super. Ct. chief judge or his designee.

61. Judicial personnel are not authorized to dismiss jurors in Super. Ct.

62. Atherton alleges that Zachem, Bailey-Jones, Wynn & Delaney acted outside the scope of their employment and authority when they conspired to and did remove Atherton involuntarily.

63. Based on information Wynn is the final policy maker for judicial jury discipline.

64. Atherton alleges that a motivating reason for the removal occurred after AUSA presented a homicide case involving a Black-Hispanic altercation.

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65. After a witness who could not speak english testified, Atherton thanked the witness in spanish.

66. Atherton felt a hostile attitude from a few members of the jury when there was continuing rebuttal to every comment Atherton made concerning deliberation on elements of crimes.

67. Based on information Atherton alleges that he was the only semi-fluent spanish speaking grand juror and Atherton is in fact half mexican.

68. Atherton alleges that the named defendants individually and in their official capacity conspired under color of law to illegally remove Atherton* from the grand jury without due process of law because of his meticulous nature, thoroughness of deliberation and/or for ethnic purposes, thereby illegally denying Atherton the rights, privileges and immunities of a grand juror.

69. Atherton alleges that defendants obstructed the course of justice by unjustifiably removing a capable, deliberating grand juror, which tended to send a chilling effect to any other juror concerning independence of thought and speech.

70. Based upon information, Atherton alleges that a possible objective was to obtain a grand jury which would "rubber stamp" the AUSA charges.

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* Atherton possesses electrical & nuclear engineering degrees.

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71. Atherton alleges that when a grand jury votes for indictments without knowing the elements of crimes it is tantamount to "rubber stamping" the AUSA charges.

72. The conspiracy among the parties penalized Atherton for exercising his 1st amendment rights And was a form of retaliation.

73. Based upon information Atherton's removal without cause from the grand jury discriminated against Atherton and hispanics in particular because there were no other hispanics on the jury.

74. Atherton alleges that public policy requires that the independence of the grand jury be preserved.

75. Atherton alleges that these unlawful acts would not have occurred but for the fact that the defendants were government officials acting beyond their authority under color of law, custom or usage.

76. In summary Atherton alleges that defendants individually And/or officially conspired to and did in fact remove Atherton illegally from grand jury duty under color of law, without authority, thereby obstructing justice and causing damages.

77. To the extent that D.C., Super. Ct., & DOJ are permitted to be held liable for their employees actions, they are so held.

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78. To the extent that 42 U.S.C. § 1983 et al. is not available, Atherton alternatively alleges a "Bivens" Constitutional tort as similarly described within.

DAMAGES

79. Atherton seeks actual damages equal to the amount of money he would have earned had he completed his 25 day jury service, with Appropriate interest.

80. Atherton seeks additional monetary compensation for various emotional trauma, including intimidation, injury to reputation, embarrassment, humiliation, etc,

81. Atherton seeks punitive damages for reckless and callous indifference to Atherton's rights.

82. Because Atherton alleges that defendants committed egregious acts against both himself and the grand jury system, Atherton seeks total damages of $250,000.

83. Atherton seeks costs, pre-and post-judgment interest, attorneys fees and attorney-equivalent fees where appropriate. Atherton seeks equitable relief accordingly.

84. A written apology from defendants.

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85. A declaratory judgment identifying which of Atherton's grand jury rights were contravened.

86. A reinstatement to a jury wheel for random selection for grand jury service.

87. A declaratory judgment identifying which of the grand jury's target defendant's rights were contravened, (see para. 12).

88. Removal of Atherton's name from any jury "blacklist," thereby fully qualifying Atherton for both petit and grand jury service.

89. Such other relief as this Honorable court deems proper.

JURY DEMAND

90. Atherton respectfully requests a trial by jury to every issue triable by jury.

VERIFICATION

Atherton verifies that the statements in this Complaint are based upon available information and are truthful to the best of Atherton's knowledge, knowingly saying this under penalty of perjury.

April 9, 2004

/s/ Peter James Atherton

APPENDIX E — AFFIDAVIT OF PETER ATHERTON DATED NOVEMBER 23, 2006, AND ATTACHED ELECTRONIC-MAIL FROM DANIEL ZACHEM TO SUZANNE BAILEY-JONES DATED APRIL 12, 2001

AFFIDAVIT #1
Of
Peter James Atherton

The Zachem e-mail of 4/12/2001

Based upon personal knowledge, after the submission of a freedom of information/privacy act request in December, 2003 to the Office of Mayor of the District of Columbia by me, I received a response concerning the grand jury matter from "Grand Jury April #1, 2001."

Included with the response is the attached e-mail from U.S. Justice Dept. employee Dan Zachem to S. Bailey-Jones, who in turn forwarded the e-mail to Roy S. Wynn.

I affirm under penalty of perjury that the subject e-mail from Dan Zachem described above is a copy of the original which I received in the response to my FOIA/PA request to the Office of the Mayor of the District of Columbia.

11/23/2006

/s/ Peter James Atherton

Appendix E

Wynn, Roy S.

From: Bailey-Jones, Suzanne
Sent: Thursday, April 12, 2001 1:57 PM
To: Wynn, Roy S.
Subject: FW: Release of Grand Juror from April GJ # 1

—Original Message—
From: Dan Zachem [mailto:Dan.Zachem2@usdoj.gov]
Sent: Thursday, April 12, 2001 1:44 PM
To: BAILEYJS@DCSC.GOV
Subject: Release of Grand Juror from April GJ # 1

Sue:

In response to your request for a brief synopsis of events before Grand Jury April #1, I provide to you the following summary of facts, gleaned solely from my memory of the extraordinary events that have transpired this week.

Grand Jury April #1 began its service on Monday, April 9, 2001. During the first several days of service, this grand jury, not unlike any other newly impaneled grand jury, posed questions, both legal and factual, to the Assistant United States Attorneys ("AUSA's") who appeared before them. Frequently, grand jurors, not being satisfied with the response of individual AUSA's, ask that a supervisor appear to continue the dialogue concerning particular legal issues. Thus, it was not entirely surprising when, on the afternoon of April 10, 2001, Grand Jury Deputy Chief Robin Ashton was asked

to appear before the grand jury to answer several grand jury questions. On the record and behind closed doors, several jurors raised concerns regarding an unnamed colleague who, in the view of the questioners, was inhibiting the grand jury from discharging its function. Ms. Ashton counseled patience and collegiality, suggesting that one of the great virtues of grand jury service was that its members are drawn from a cross section of the community and that respect for the views of others was essential to the discharge of one's responsibilities as a grand juror. On Wednesday April 11, 2001, Deputy Chief Dan Zachem was visited on several occasions by an AUSA presenting evidence to this particular grand jury. The AUSA indicated that a particular juror, identified only as "a scientist" was clearly frustrating his colleagues. More specifically, the AUSA reported that "the scientist" was desirous of additional written materials, including additional jury instructions and code provisions, and these requests, in conjunction with extensive questioning of both prosecutor and witness alike, was clearly agitating other members of the grand jury. Efforts were made to satisfy the requests of "the scientist" by, for example, providing xerox copies of several code provisions, but these efforts proved unsuccessful in mollifying his concerns. At approximately 3:00 p.m., Deputy Chief Dan Zachem was informed by the AUSA that the grand jury was demanding to see a supervisor "immediately." Zachem promptly responded to the grand jury area and discovered two persons, who later turned out to be the grand jury foreperson and "the scientist" locked in an intense conversation directly outside of the closed grand

jury door. The foreperson informed Zachem that "we are not ready for you right now" but promised to summon Zachem back when needed. Within minutes, Zachem was in fact summoned back to the grand jury. Thereafter, behind closed doors, on the record and in the presence of the scientist, several grand jurors, no fewer than 5-6 in number, expressed the view that a single grand jury member was frustrating the grand jury's ability to conduct business. More specifically, these grand jurors, who were not contradicted by any of their number, expressed in emotional terms their belief that the offending grand juror was "either unwilling or unable to follow the rules" regarding, among other things, the burden of proof, an orderly deliberative process and voting. As I was clearly hearing matters touching solely, if not entirely upon the deliberative process, I expressed no views, but rather, listened politely as the grand jurors expressed their acute frustration with their predicament: Nodding heads greeted one comment that suggested that the time of all participants in the process, including witnesses, prosecutor, and court reporters, was being wasted. I left the room without expressing an opinion, but promising to bring this matter to the immediate attention of the court for prompt resolution: I was followed out of the grand jury room by the foreperson, who was clearly exasperated by these events. Clearly frustrated, he stated that he had tried to work with the grand juror on several occasions to no avail. Immediately thereafter; I spoke briefly to Roy Wynn (phonetic) of the District of Columbia Superior Court Juror's Office who, in turn, directed me to you. Mr. Wynn

was of the view that the juror should report immediately to Superior Court. As I said yesterday, I do not think it appropriate for the US Attorney's Office, in circumstances such as these, to take a position with respect to the removal of a particular juror from service. I am entirely confident in reporting, however, that based upon my observations, if the juror was permitted to remain, that Grand Jury April #1 would not have been able to discharge its function. If you need anything else from me, do not hesitate to let me know. Dan

APPENDIX F — DISTRICT OF COLUMBIA SUPERIOR COURT RULE OF CRIMINAL PROCEDURE 6(g)

Rule 6(g) of the District of Columbia Superior Court Rules of Criminal Procedure:

Discharge and excuse. A grand jury ordered by the Superior Court shall serve until discharged by the Chief Judge or other judge designated by the Chief Judge; but no grand jury may serve more than 18 months unless the Chief Judge or designee extends the service of the grand jury for a period of 6 months or less upon a determination that such extension is in the public interest. At any time for cause shown, the Chief Judge or other judge designated by the Chief Judge may excuse a juror either temporarily or permanently, and in the latter event the Chief Judge or designee may impanel another person in place of the juror excused.

No. 09-889

IN THE

Supreme Court of the United States

DANIEL M. ZACHEM,

Petitioner,

v.

PETER JAMES ATHERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT

This case involves the involuntary dismissal of a sitting grand juror by a jury officer of the District of Columbia Superior Court, contrary to court rules and under an unwritten, idiosyncratic local practice that has since been prohibited. The issue is whether a supervisory prosecutor who participated in the improper dismissal and who was not involved in the presentation of evidence to the grand jury is entitled to absolute immunity from a *Bivens* suit by the unlawfully dismissed grand juror.

Peter James Atherton, a Washington, D.C., resident with degrees in electrical and nuclear engineering, was sworn in as a member of a District of Columbia Superior Court grand jury on April 9, 2001, for a term of 25 days. *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 678 (D.C. Cir. 2009); Pet. App. 5a. The grand jurors were given a jury instruction book identifying crimes and their elements. *Id.*; Pet. App. 7a. As prosecutors presented evidence to the grand jury to obtain indictments, Atherton became concerned that some of the crimes for which indictments were being sought were not identified in the instruction book. *Id.*; Pet. App. 5a. With the foreman's concurrence, Atherton obtained additional information on those crimes and their elements from the prosecutors. *Id.*; Pet. App. 61a. Atherton also questioned some of the witnesses to satisfy himself that there was sufficient credible evidence to justify an indictment. *Id.* at 679; Pet. App. 7a.

Atherton's requests for additional information and his questioning of witnesses caused some delay in the grand jury deliberations and some of the grand jury members became upset.[1] One day later, on April 10, 2001, a supervising prosecutor was summoned by the grand jury, listened to their complaints and "counseled patience and collegiality."[2]

The following day, a different supervising prosecutor, Petitioner Daniel M. Zachem, was contacted by the prosecutor presenting evidence to the grand jury and was told that a particular grand juror, was "frustrating his colleagues" by his meticulous approach to grand jury service. *Atherton*, 567 F.3d at 678-79; Pet. App. 7a. Later that same day, Zachem was summoned to the grand jury room in his capacity as a supervisor. *Id.* at 679; Pet. App. 7a. There, several grand jurors "expressed the view that [Atherton] was frustrating the grand jury's ability to conduct business." *Id.*; Pet. App. 7a-8a. Zachem then contacted the Superior Court Director of Special Operations, Roy Wynn, who directed him to the jury officer, Susanne Bailey-Jones. *Id.* at 676,

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[1] "Some jurors seemed upset because they had voted to indict without knowledge of the elements and a new vote would be needed once the elements of the charge were known." *Id.* at 678 (internal quotations omitted); Pet. App. 5a (internal quotations and citation omitted).

[2] Zachem's Email to Bailey-Jones, Pet. App. 73a. Both the petition and the D.C. Circuit rely heavily on Zachem's email to Bailey-Jones written on April 12, 2001, the day after Atherton's dismissal. Because there has been no discovery, the veracity of Zachem's after-the-fact, self-serving version of the events related in the email has, of course, never been tested.

679; Pet. App. 8a. After discussing the matter with Bailey-Jones, Zachem returned to the grand jury room, confiscated Atherton's notes, and told Atherton to report to Wynn "immediately." *Id.* at 678; Pet. App. 7a. Atherton was directed to Bailey-Jones, who summarily and permanently dismissed him from the grand jury. *Id.* at 678; Pet. App. 6a. Atherton "was never permitted the opportunity to defend himself" and was given no "reasons for his dismissal." *Id.*; Pet. App. 6a.

The rules of the Superior Court in effect at the time provided:

> (g) Discharge and excuse. . . . At any time for cause shown, *the Chief Judge or other judge designated by the Chief Judge* may excuse a juror either temporarily or permanently, and in the latter event, the Chief Judge or designee may impanel another person in place of the juror excused.

Id. at 679; Pet. App. 9a (quoting D.C. SUP. CT. R. CRIM. P. 6(g) (emphasis added)).

Despite the clear language of the Rule, Chief Judge Rufus G. King III stated in an affidavit that he "was never contacted by anyone from the Court's jury office or the U.S. Attorney's office before or at the time of the removal of grand juror Atherton." *Id.*(internal quotation marks and citation omitted); Pet. App. 9a. King, who had been appointed as Chief Judge only recently, explained that at the time "there were no formal procedures in place . . . for disciplining jurors" and that "[t]he practice then in place did not include contacting the chief judge before a grand juror was involuntarily dismissed." *Id.*

(internal quotation marks and citation omitted); Pet. App. 9a. The Chief Judge further stated that he "changed the procedures to require that [he] be consulted before imposition of any grand jury discipline." *Id.* (internal quotation marks and citation omitted).

In April 2004, proceeding *pro se*, Atherton filed this suit against several city and federal officials, including Bailey-Jones and Zachem, asserting due process and equal protection claims pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Atherton*, 567 F.3d at 680; Pet. App. 10a. Atherton alleged tha t he was unlawfully removed from grand jury service because of, among other things, his "meticulous nature, [and] thoroughness of deliberation."[3] *Id.* (quoting Complaint ¶ 68); Pet. App. 69a. The district court granted the defendants' motion to dismiss, holding, *inter alia*, that both Bailey-Jones and Zachem were entitled to absolute immunity. *Atherton v. D.C. Office of the Mayor*, No. 04-0680, at 12, 2007 WL 1041659 (D.D.C. Apr. 5, 2007); Pet. App. 40a.

In June 2009, the D.C. Circuit reversed the dismissal of Atherton's due process claims against Bailey-Jones and Zachem, holding that neither was

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[3] The district court initially dismissed the action *sua sponte* for lack of subject matter jurisdiction, but this was summarily reversed by the D.C. Circuit and the case remanded. *Id.* (citing *Atherton v. D.C. Office of the Mayor*, No. 04-5268 (D.C. Cir. June 21, 2005)).

entitled to absolute immunity.[4] It affirmed the dismissal of all remaining claims.[5] *Id.*; Pet. App. 4a.

Applying this Court's "functional approach" to the prosecutorial immunity issue, the D.C. Circuit concluded that Zachem's participation in Atherton's removal from the grand jury was neither "intimately associated with the judicial phase of the criminal process", nor did it "occur in the course of his role as an advocate for the State" so as to be shielded by absolute immunity. *Id.* at 686 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); Pet. App. 26a. It found that Zachem's conduct was also not comparable "to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity," such as deciding whether to initiate a prosecution, participating in a probable cause hearing, presenting the state's case at trial, or evaluating which evidence to present to the grand jury. *Id.* (citing *Imbler*, 424 U.S. at 409, *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Kalina*, 522 U.S. at 118); Pet. App. 26a.

The court meticulously analyzed this Court's most recent decision on prosecutorial immunity, *Van de*

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[4] *Atherton*, 567 F.3d at 677 (Kavanaugh, Edwards, and Williams, J.J.); Pet. App. 4a. Atherton's *pro se* petition for certiorari from the Court of Appeals' dismissal of his claims against the other defendants was denied by this Court on March 29, 2010. *Atherton v. D.C. Office of the Mayor*, No. 09-8739.

[5] The panel included two former prosecutors, Circuit Judges Williams and Kavanaugh.

Kamp v. Goldstein, 129 S. Ct. 855 (2009), which addressed the issue of "how immunity applies where a prosecutor is engaged in certain administrative activities." *Id.* at 861; Pet. App. 27a-28a. In *Van De Kamp*, this Court drew a sharp distinction between the "kind of administrative obligation . . . that itself is directly connected with the conduct of a trial," *id.* at 862, such as the training and supervision of trial prosecutors, which it concluded is entitled to absolute immunity, and other kinds of administrative activities, which are not. *Id.* Because Zachem's participation in Atherton's removal from the grand jury "had nothing to do with a prosecutor's preparation for or participation in a criminal trial," *Atherton*, 567 F.3d at 687, the D.C. Circuit concluded that *Van de Kamp* taught that Zachem was not entitled to absolute immunity. *Id.*; Pet. App. 28a. Finally, the court concluded that the *Imbler* factors also counseled against absolute immunity. *Id.*; Pet. App. 28a-29a.

The Court of Appeals noted that there remained an issue as to whether either Bailey-Jones or Zachem was nevertheless entitled to qualified immunity. *Id.* at 689; Pet. App. 32a. Because this was "a challenging question" that had not been addressed by the district court and had been "only thinly briefed on appeal," the Court of Appeals concluded that it was "not in a position to address the questions that remain to be answered here." *Id.* at 689-91; Pet. App. 36a-38a. It accordingly remanded the case to the district court to consider the qualified immunity issue and the other issues identified in its opinion. *Id.* at 691; Pet. App. 39a.

Zachem filed a petition for rehearing *en banc*, which was denied when no judge called for a vote. Pet. App. 56a. He sought certiorari from this Court. Atherton's time to file a brief in opposition was extended from February 25, 2010, to April 12, 2010. Jury officer Bailey-Jones did not file a petition for a writ of certiorari with this Court. Because the mandate of the Court of Appeals has issued and has not been stayed, both Bailey-Jones and Zachem are presently before the district court on remand for a determination of the qualified immunity issue. The district court has scheduled a status conference for June 18, 2010.

REASONS FOR DENYING THE PETITION

The petition raises no issue that warrants consideration by this Court. It involves only the unique question of whether, on the eccentric facts of this case, absolute immunity should be extended to a supervisory prosecutor's participation in the unauthorized removal of a sitting grand juror by a Superior Court jury officer acting pursuant to an unwritten local practice that has since been halted. There is no conflict among the Courts of Appeals on this issue, and there is no showing that the type of prosecutorial conduct involved here is common (or even rarely recurring). At bottom, it involves only the application of well-established legal principles governing absolute prosecutorial immunity to the facts of this particular case. The court below engaged in a thoughtful analysis of this Court's decisions concerning absolute immunity, including last Term's decision in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and its conclusion that absolute immunity is not justified in this case is in full accord with the

principles established by this Court. Nothing in that factbound determination warrants further review in this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER CIRCUIT COURTS' DECISIONS

In search of a certworthy issue, Zachem first contends that the decision below creates a circuit split, but that is not the case.[6] He cites two cases in support of his claimed conflict: *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047 (8th Cir. 1992), involving a claim for defamation based on statements in a grand jury's report that prosecutors helped to draft; and *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990), in which prosecutors carried out a judge's order to confiscate unauthorized materials distributed to grand jurors. Neither bears any resemblance to this case; indeed, they are so different that, far from presenting any conflict, they emphasize the unique circumstances presented here. In both *DeCamp* and *Fields* state prosecutors were carrying out their assigned duties under state law. Neither case involves the claim of a grand juror unlawfully dismissed for diligently performing his sworn duties, at the instance of a prosecutor not otherwise involved in presenting evidence to the grand jury.

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[6] Zachem did not raise any supposed conflict with other circuits in his petition for rehearing and rehearing *en banc*, so the D.C. Circuit did not have the opportunity to address this argument. Had it been presented, it would have been disposed of quickly.

The petition claims that the Second and Eighth Circuits held that "a supervisory prosecutor who does not actively present evidence to a grand jury may still be entitled to absolute immunity." Pet. 10. It is true that a supervisory prosecutor who does not actively present evidence to a grand jury may be entitled to absolute immunity under appropriate circumstances. It is also true that a supervisory prosecutor who does not actively present evidence to a grand jury may *not* be entitled to absolute immunity, under appropriate circumstances. As this Court's cases teach, it is the prosecutor's *function* that is crucial, and the functions of the prosecutors in *DeCamp* and *Fields* are in stark contrast to the function performed by Zachem here.

In both *DeCamp* and *Fields*, prosecutors were acting in a manner authorized by state law, and in direct support of a proper function of a judge or a grand jury, who themselves enjoyed absolute immunity, and the courts concluded that it would be anomalous to grant lesser immunity to the prosecutor. Here, Zachem acted together with a jury officer who has been determined *not* to enjoy absolute immunity, and it would have been anomalous for the D.C. Circuit to hold differently.[7] Petitioner does not, and cannot, cite any case

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[7] One very broad principle implicated in *DeCamp* and *Fields* is avoiding the anomaly of giving the prosecutor different immunity from the organ (judge or grand jury) in whose support he or she operates. On that very general level, the decision below is consistent with *DeCamp* and *Fields*, with which Zachem's desired result would conflict.

remotely resembling this one, let alone conflicting with it.

A. The D.C. Circuit's Decision Does Not Conflict with the Eighth Circuit's Decision in *DeCamp*

In *DeCamp*, prosecuting attorneys helped a grand jury prepare an official report setting forth the results of its investigation into possible criminal activity by influential members of the community. 978 F.2d at 1049. Under Nebraska law, prosecutors had a duty to give legal advice to the grand jury "in any legal matter." *Id.* (quoting NEB. REV. STAT. § 29-1408). The grand jury report contained allegedly defamatory statements about an attorney who was neither the target of the grand jury investigation, nor a witness before it. *Id.* That attorney brought a 42 U.S.C. § 1983 action against the grand jurors and prosecutors for violating his constitutional rights to due process and free speech. *Id.*

The Eighth Circuit first held unanimously that the grand jurors were entitled to absolute immunity for their issuance of the report. *Id.* at 1050-51. The majority then held that the prosecutors were entitled to absolute immunity for co-authoring the report. *Id.* at 1054. The court upheld the district court's finding that the prosecutors' assistance in drafting the report fell under their statutory duty imposed by Nebraska law to serve as the grand jury's legal advisors. *Id.* at 1053. Applying the functional approach, the majority concluded that in advising the grand jury, the prosecutors were helping it to perform its quasi-judicial functions, and, as such, they were put "in the midst of an activity 'intimately associated with the judicial phase of the criminal

process.'" *Id.* at 1054 (quoting *Imbler*, 424 U.S. at 430).

DeCamp, therefore, is wholly different from this case for several reasons. First, it turned on the fact that the function at issue (helping the grand jury to prepare its report) constituted the proper provision of legal advice within the meaning of a state statute. Here, no statute or rule authorized Zachem to procure the dismissal of a grand juror. To the contrary, as the petition concedes, Pet. 19-20, only the Chief Judge or another judge designated by the Chief Judge had the authority to dismiss a grand juror.

Second, the prosecutors were engaged in the traditional prosecutorial function of assisting the grand jury determine whether to return an indictment and to prepare a report explaining its decision not to indict. The function of the prosecutors in *DeCamp*, therefore, was unquestionably "intimately associated with the judicial phase of the criminal process," as the Eighth Circuit found. *DeCamp*, 978 F.2d at 1054. Here, Zachem's conduct had nothing to do with the judicial phase of the criminal process. Instead, Zachem became involved in an internal conflict among members of the grand jury. His action in procuring Atherton's removal was an administrative act unrelated to any proper judicial or prosecutorial function.

In sum, *DeCamp* had a different outcome on the basis of very different facts, and with respect to general principles of prosecutorial immunity, the decision of the Eighth Circuit is in harmony with that of the D.C. Circuit.

B. The D.C. Circuit's Decision Does Not Conflict with the Second Circuit's Decision in *Fields*

Nor does the decision below create a conflict with the Second Circuit's decision in *Fields*. The plaintiff in *Fields*, while serving on a state grand jury, tried to initiate a criminal proceeding against one of the prosecutors. 920 F.2d at 1116. The grand juror requested the supervising prosecutor's permission to present materials regarding the subject of his own investigation. *Id.* The request was denied. *Id.* The supervising judge later issued an order prohibiting that juror from communicating with his fellow grand jurors about anything other than what was brought to their attention by the prosecutors. *Id.* When the grand juror disregarded that order and distributed unauthorized materials to the other grand jurors, the judge directed two prosecutors to confiscate those materials. *Id.* The grand juror's subsequent 42 U.S.C. § 1983 action against the judge and the two prosecutors was dismissed on absolute immunity grounds. *Id.* at 1116-17.

Fields, like *DeCamp*, is utterly unlike this case, and does not conflict with this case on an issue of law. First, it does not deal with the dismissal of a grand juror (and the Petition cites no case that does). Second, the court in *Fields* determined that advising the grand jury of the judge's orders and overseeing the confiscation of unauthorized materials pursuant to the judge's directions were part of the prosecutors' duties under New York state law, *id.* at 1120 (citing N.Y. CRIM. P. LAW §§ 190.25(6), 190.50(2)), whereas here, Zachem's action violated the applicable court rule.

More importantly, the Second Circuit in *Fields* applied the required functional analysis and held that carrying out the judge's orders was a function so "intimately associated with the judicial phase of the criminal process," that the prosecutors were entitled to absolute immunity. *Id.* at 1120 (quoting *Imbler*, 424 U.S. at 430). The court found that the conduct of the prosecutors was much like a prosecutor's conduct in securing an indictment or proving guilt at trial. *Id.* The prosecutors' confiscation of materials that one of the grand jurors sought to circulate was, therefore, analogous to their role in determining which evidence the grand jury should, or should not, consider and directly involved the presentation of evidence to the grand jury, a core prosecutorial function traditionally protected by absolute immunity. By contrast, Zachem's conduct had nothing to do with deciding what evidence the grand jury should consider. Rather, Zachem decided *which* grand jurors could consider whatever was presented, which had nothing to do with any core, or even peripheral, prosecutorial function traditionally protected by absolute immunity. Indeed, the District of Columbia conceded in the Court of Appeals that the dismissal of a grand juror was an administrative function. *Atherton*, 567 F.3d at 684; Pet. App. 20a.

Because the functions undertaken by the prosecutors in *Fields* were prosecutorial while the function undertaken by Zachem was administrative, there is no conflict between the two decisions.

II. THIS CASE'S UNUSUAL FACTS MAKE IT A POOR VEHICLE TO DEVELOP THE LAW OF ABSOLUTE PROSECUTORIAL IMMUNITY

Zachem argues that his is an exceptionally important case that warrants this Court's review, claiming that it will have broad-reaching impact and "will likely influence the conduct of every prosecutor in the United States with involvement before grand juries." Pet. 26. In fact, this case is apparently unique, arising out of an errant practice in the D.C. Superior Court, which has since been corrected. No similar case has been identified, and the juror dismissal situation giving rise to this case is unlikely to recur.

Nothing about this case suggests that it will expose prosecutors to vexatious litigation. Given the unusual nature of this case, Zachem's contention that the D.C. Circuit's decision represents a significant "erosion" of absolute immunity for prosecutors, Pet. 26, is hardly persuasive. The D.C. Circuit's decision is narrow in scope, applying this Court's settled law to these unique factual circumstances. The case has literally nothing to do with a prosecutor's usual grand jury duties of presenting evidence and providing legal advice to grand juries.

Most prosecutorial immunity cases arise in the context of a criminal defendant suing a prosecutor. *See Van de Kamp*, 129 S. Ct. at 860 (citing *Imbler* 424 U.S. at 425). Indeed, all of this Court's decisions involving prosecutorial immunity dating back to

Imbler appear to address this situation.[8] The analysis in this Court's prosecutorial-immunity jurisprudence is rooted in the notion that a contemporary 42 U.S.C. § 1983 action against a prosecutor is analogous to a common-law action for malicious prosecution. Citizens excused or dismissed from grand jury service are very different from those prosecuted or convicted of crimes. The petition has pointed to no other case where a grand juror has sued a prosecutor for wrongful removal from a grand jury and our research has disclosed none. The absence of cases involving grand jurors suing prosecutors for involuntary dismissal should counsel against the grant of certiorari. And this case can hardly be characterized as frivolous or vexatious, as attested to by the D.C. Circuit's decision and the fact that the Chief Judge of the Superior Court took action to prevent this circumstance from arising again.

Nor, for that matter, would the situation of the unlawfully dismissed grand juror implicate the general concerns underlying prosecutorial immunity.

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[8] *E.g.*, *Van de Kamp*, 129 S. Ct. at 862-65 (addressing claims by a criminal defendant against a prosecutor for his failure to properly supervise and train subordinates); *Kalina*, 522 U.S. 118 (addressing claims by a criminal defendant against a prosecutor for making false statements in an affidavit); *Buckley*, 509 U.S. 259 (addressing claims by a criminal defendant against a prosecutor for fabricating evidence and making false statements); *Burns*, 500 U.S. 478 (addressing claims by a criminal defendant against a prosecutor for his participation in probable cause hearing and for his legal advice to the police); *Imbler*, 424 U.S. 409 (addressing claims by a criminal defendant against a prosecutor for knowingly using false evidence and suppressing material evidence).

It is one thing to be concerned that if prosecutors were not protected from legal liability for their *prosecutorial advocacy*, that might generate timidity where fearlessness is desired. The same concern cannot be said to apply to a prosecutor's *removing uncooperative grand jurors* without intervention of a judge, where similar concerns of fearlessness and timidity do not apply.[9]

Not only do the unusual facts of the case counsel against granting certiorari, the clarity of the procedural rules governing removal of grand jurors all over the country also counsels against it, because they make it unlikely that a similar claim will arise again.

When Atherton was wrongfully removed from the grand jury, the D.C. Superior Court Rules were clear as to what procedure should have been followed:

> A grand jury ordered by the Superior Court shall serve until discharged by the Chief Judge or other judge designated by the Chief Judge . . . . At any time for cause shown, the Chief Judge or other judge designated by the Chief Judge may excuse a juror either temporarily or permanently, and in the latter

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[9] To the contrary, prosecutors should have no power to remove grand jurors, because the historic and essential role of the grand jury is precisely to be a check on the overzealous prosecutor. *See United States v. Mandujano*, 425 U.S. 564, 571 (1976) ("Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.")

> event the Chief Judge or designee may impanel another person in place of the juror excused.

D.C. SUP. CT. R. CRIM. P. 6(g).

Atherton's dismissal by a jury officer violated that rule and was based on an unwritten "practice," in which a jury officer, rather than a judge, assumed the power to remove a grand juror. That procedure was changed as soon as the Chief Judge learned what was occurring. The Chief Judge "changed the procedures to require that [he] be consulted before imposition of any grand jury discipline." *Atherton*, 567 F.3d at 679; Pet. App. 9a. A situation comparable to Atherton's is thus unlikely to recur in D.C. Superior Court.

Likewise, this situation is unlikely to arise in the federal district courts. Federal Rule of Criminal Procedure 6(h), permits only a judge to remove a grand juror: "At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror." Federal Rule of Criminal Procedure 1(b)(2) states that "court" means "a federal judge performing functions authorized by law." The same is true in the state court systems requiring indictment by grand jury in state court criminal proceedings.[10] Petitioner

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[10] *See, e.g.*, ALASKA R. CRIM. P. 6(s) (a judge may excuse a grand juror); DEL. R. CRIM. P. 6(G) (same); FLA. STAT. ANN. § 905.01 (same); ME. R. CRIM. P. 6(j) (same); N.J. STAT. ANN. § 3:6-2 (2001) (motions challenging grand jurors "shall be tried by a judge"); N.C. GEN. STAT. § 15A-622 (2009) (a judge may discharge a sitting grand juror "upon a finding that he is

(Continued ...)

has pointed to no other court in which a "practice" such as the one previously followed in D.C. Superior Court has ever existed, and we are aware of none. Thus the situation presented here is unlikely to arise again.

In short, the unique facts of this case combined with the clear rules of the courts governing removal of a grand juror make review of this case unnecessary. On the one hand, this Court's consideration of this case would not significantly develop the jurisprudence with respect to prosecutorial immunity or provide substantial guidance to lower courts in the usual cases involving claims by criminal defendants. On the other hand, denying review in this case will neither encourage similar litigation by grand jurors nor make litigation by criminal defendants more likely.

III. THE DECISION BELOW IS IN ACCORD WITH THIS COURT'S PRECEDENTS

Finally, the petition asserts a conflict with this Court's prosecutorial immunity precedents. There is no such conflict. The D.C. Circuit properly stated and properly applied the well-established legal principles governing immunity, including the recent *Van de Kamp* decision, to the facts of this case.

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disqualified from service, incapable of performing his duties; or guilty of misconduct"); OHIO R. CRIM. P. 6(G) (court may excuse a sitting juror); R.I. SUPER. CT. R. CRIM. P. 6(g) (same); S.C. CODE ANN. § 14-7-1730 (same); TEX. CODE CRIM. PROC. ANN. ART. 19.26 (2005) (a prosecutor "shall prepare an order for the court . . . dismissing the disqualified or unavailable juror from the grand jury"); W. VA. R. CRIM. P. 6(g) (a grand juror may be excused by the court).

A. The Criteria for Determining Absolute Immunity Have Already Been Decided by This Court

As Zachem acknowledges, this Court has been "sparing in its recognition of claims to absolute official immunity." Pet. 16 (quoting *Forrester v. White*, 484 U.S. 21 9, 224 (1988)). This Court has made clear that "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley*, 509 U.S. at 273. Instead, prosecutors are shielded by absolute immunity only when they perform certain functions and when certain public policy considerations compel the grant of absolute immunity. *See, e.g., Burns*, 500 U.S. at 486-87. Here, neither Zachem's "function" of securing Atherton's removal from the grand jury, nor public policy considerations, supports the shield of absolute immunity.

To seek absolute immunity for his allegedly unconstitutional conduct, Zachem must overcome the presumption that qualified immunity is sufficient to protect him, as it is sufficient to protect almost all other government officials. *Id.* This Court has granted absolute immunity "'only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.'" *Forrester*, 484 U.S. at 230 (quoting *Forrester v. White*, 729 F.2d 647, 660 (1986) (Posner, J., dissenting)).

To determine whether an official is entitled to absolute immunity, this Court has applied a "functional" approach. *Id.* at 224. Under this approach, courts "examine the nature of the functions with which a particular official . . . has

been lawfully entrusted, and . . . evaluate the effect that exposure to . . . liability would likely have on the appropriate exercise of those functions." *Id.* The Court has consistently emphasized that "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227 (emphasis in original).

Because certain prosecutorial functions are "intimately associated with the judicial phase of the criminal process," prosecutors enjoy absolute immunity from damages liability, but only when they act "within the scope of [their] prosecutorial duties." *Imbler*, 424 U.S. at 420, 430. In *Imbler*, the Court held that prosecutors are shielded by absolute immunity for their actions as advocates for the state. *Id.* at 430, 430 n.33.

In subsequent decisions, the Court clarified that absolute immunity is mostly reserved for traditional prosecutorial functions.[11] "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity."[12] *Buckley*, 509 U.S. at 273 (citing *Burns*, 500 U.S. at 494-96).

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[11] Indeed, Zachem recognizes in his petition, Pet. 14 (citing *Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001)), that other courts of appeals, applying these precedents, have indicated that when a prosecutor's interaction with a grand jury does not involve the traditional advocacy function of seeking an indictment, he may not be entitled to absolute immunity.

[12] Accordingly, using false testimony and suppressing exculpatory evidence, *Imbler*, 424 U.S. at 411-13, participating

(Continued ...)

Last Term, this Court addressed whether certain administrative functions of a prosecutor are shielded by absolute immunity. In *Van de Kamp*, 129 S. Ct. 855, a successful *habeas corpus* petitioner claimed that a supervising prosecutor's failure to train and supervise attorneys under his charge led to the withholding of impeachment evidence and resulted in his being deprived of a fair trial. *Id.* at 859. This Court extended absolute immunity to the administrative function at issue because it was "directly connected with the conduct of a trial." *Id.* at 862. Unlike other administrative decisions not covered by absolute immunity, "an individual prosecutor's error in the plaintiff's specific criminal trial constitute[d] an essential element of the plaintiff's claim." *Id.* The Court reasoned that a holding to the contrary would create a practical anomaly: a subordinate prosecutor who withheld impeachment evidence at trial would remain immune even when the error was committed intentionally, whereas the supervising prosecutor

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in a probable cause hearing, *Burns*, 500 U.S. at 482, preparing and filing charging documents, *Kalina*, 522 U.S. at 121-22, and presenting the evidence to a grand jury, *Buckley*, 509 U.S. at 261-64, are advocatory acts covered by absolute immunity.

On the other hand, giving legal advice to the police, *Burns*, 500 U.S. at 482, fabricating evidence by seeking a biased expert witness, making false statements at a press conference, *Buckley*, 509 U.S. at 262-64, and executing a *sworn* statement to obtain an arrest warrant, *Kalina*, 522 U.S. at 121 (emphasis added), are covered only by qualified immunity because those are prosecutorial functions that are "not within the advocate's role." *Buckley*, 509 U.S. at 278.

could be liable even for merely negligent supervision leading to the same evidence being withheld. *Id.* at 863.

B. The D.C. Circuit's Decision Is in Full Accord with the Principles Established by This Court, and Would not Merit Review in Any Event

The petition asserts that the D.C. Circuit "misapprehended" Zachem's case and "misapplied" this Court's precedents. This Court's review would not be warranted even if those assertions were correct, but they are not.

1. Misapplication of Law is Not a Ground for Review

First, as a general matter, this Court does not grant review where, as here, the petitioner's claim boils down to nothing more than an alleged misapplication of law. As Supreme Court Rule 10 states, a petition for certiorari is "rarely granted when the asserted error consists of [*inter alia*] the misapplication of a properly stated rule of law."

Here, the D.C. Circuit correctly stated, carefully analyzed, and faithfully applied the principles governing absolute immunity. *Atherton*, 567 F.3d at 682-87. The court discussed and applied the functional approach established by *Imbler* and its progeny. *Id.* Relying on this Court's precedents, including the *Van de Kamp* decision, the D.C. Circuit analyzed whether the function undertaken by Zachem with respect to Atherton's removal from the grand jury was comparable to any of the functions traditionally protected by absolute immunity. *Id.* at 686-87. The court also considered whether the public

policy concerns discussed in *Imbler* weigh in favor of absolute immunity. *Id.* at 87.

Zachem acknowledges that the court below "began correctly" in applying the functional approach to his case. Pet. 17. He argues, however, that it erred in concluding that his conduct was not protected by absolute immunity – that the court was "mistaken" about the function his actions fulfilled, and "lost sight of" facts he believes weigh in his favor. Pet. 17-19. Even if Zachem were correct (which he is not), this would, at best, amount to an error in the application of a properly stated rule of law and would not warrant further consideration by this Court.

2. The Decision Below Was Correct

Contrary to Zachem's contention, the D.C. Circuit correctly applied the precedents of this Court. In accordance with the legal principles summarized above, the D.C. Circuit's holding was compelled by essentially two fact-based determinations: (1) Zachem was performing an administrative, rather than an advocatory, function; and (2) that administrative function was not "'directly connected with the prosecutor's basic trial duties.'" *See Atherton*, 567 F.3d at 682-87 (quoting *Van de Kamp*, 129 S. Ct. at 863). Both determinations were clearly correct.

The D.C. Circuit correctly noted that the conduct at issue was not "comparable to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity." *Id.* at 686. Pet. App. 26a. Although presentation of evidence to the grand jury is within the boundaries of conduct protected by absolute immunity, Zachem was not engaged in that conduct here. *Id.* at 687. He was

called into the grand jury room only in his capacity as a supervisor to deal with a dispute between grand jurors. His actions had no bearing on presentation of evidence to the grand jury. The D.C. Circuit correctly concluded that Zachem was performing an administrative function not protected by absolute immunity.[13]

Zachem claims that the D.C. Circuit's "misapprehension of Zachem's function tainted its application of *Van de Kamp*." Pet. 22. Trying to shoehorn into the holding of *Van de Kamp*, Zachem describes his actions as being performed in "'a supervisory role of the basic grand jury advocacy duties: the presentation of the government's evidence.'" Pet. 22 (citation omitted). The D.C. Circuit, however, correctly concluded that *Van de Kamp* is inapposite. *Van de Kamp* holds that a supervising prosecutor's administrative actions are protected by absolute immunity when they are "*directly connected* with the conduct of a trial." 129 S. Ct. at 862 (emphasis added). Procuring the removal of a particular grand juror has no direct

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[13] In a footnote, the petition criticizes the D.C. Circuit's reliance on this Court's venerable decision in *Ex parte Virginia*, 100 U.S. 339 (1879), which denied absolute immunity to a county judge with respect to his task of creating a juror roll for use in future trials, on the ground that this was an administrative and not a judicial function. But the D.C. Circuit cited *Ex parte Virginia* only in support of its decision that Bailey-Jones (the jury officer) was not entitled to absolute immunity, *see Atherton*, 567 F.3d at 686-87, – an issue that is not before this Court. *Ex Parte Virginia* was not even mentioned in connection with Zachem, where the court's denial of absolute immunity was based on various other decisions of this Court.

connection to presentation of evidence to the grand jury so as to bring this case within the ambit of *Van de Kamp*.[14]

Finally, Zachem claims that the Court of Appeals in *Atherton* gave inadequate consideration to the *Imbler* factors. Pet. 23-27. To the contrary, the D.C. Circuit properly considered the *Imbler* factors, and correctly concluded that they weighed against absolute immunity here. *See* 567 F.3d at 687, Pet. App. 28a-29a.

In *Imbler*, this Court held that prosecutors are shielded by absolute immunity for their actions as advocates for the state because certain public policy concerns underlying the common-law prosecutorial immunity counsel absolute immunity under 42 U.S.C. § 1983 as well.[15] *Imbler*, 424 U.S. at 422-25.

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[14] The petition's claim that some allegations of Atherton's *pro se* complaint "acknowledge[] that Zachem's function was not limited to juror removal" does not change the fact that juror removal, at issue here, is an administrative, rather than advocatory function. All of prosecutors' actions, at some point, advance the prosecutorial office's general function of bringing criminals to justice, yet some of those actions are administrative, and, therefore, enjoy only qualified immunity pursuant to *Imbler* and its progeny, unless they fall under the narrow rule of *Van de Kamp*. Certainly no dispositive significance should be attributed to a *pro se* plaintiff's general description, in layman's terms, of prosecutorial activities. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (Allegations in *pro se* complaints are held to less stringent standards, "however inartfully pleaded.")

[15] Although Atherton's action against Zachem is brought pursuant to *Bivens*, 403 U.S. 388, rather than 42 U.S.C. § 1983, federal officials' immunities largely correspond to those of their state counterparts. *Harlow v. Fitzgerald*, 457

(Continued ...)

Specifically, the Court focused on the constraint on prosecutorial discretion imposed by the fear of lawsuits, the potential for vexatious litigation, and the availability of alternative checks (safeguards) on the exercise of prosecutorial discretion within the criminal justice system, such as judicial oversight and professional disciplinary proceedings. *Imbler*, 424 U.S. at 424-29.

Here, the Court of Appeals specifically addressed these factors, concluding that "the activities for which he is being sued do not relate to his performance as an advocate for the government," that "Zachem did not demonstrate that 'the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect,'" and that "the absence of safeguards in this case counsels against extending absolute immunity to those involved." *Atherton*, 567 F.3d at 687; Pet. App. 28a-29a. Petitioner obviously does not agree with the Court of Appeals' assessment of these factors, but the issues were fully considered and there is no reason for further review by this Court.

In sum, this petition presents no circuit split or novel issue of jurisprudential or practical significance, but only the factbound, splitless, correct application of well-settled principles of law to an unusual situation which appears to have arisen only in the D.C. Superior Court and which, t hat court having since changed its practices, is not likely to recur.

U.S. 800, 809 (1982); *Butz v. Economou*, 438 U.S. 478, 504 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 2010

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-889

IN THE

Supreme Court of the United States

DANIEL M. ZACHEM,

Petitioner,

v.

PETER JAMES ATHERTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Assistant United States Attorney Daniel Zachem is entitled to absolute immunity for his actions to facilitate a grand jury's ability to consider and vote on evidence presented by the government. Zachem's supervisory conduct related directly to the initiation of a prosecution and a prosecutor's role as advocate for the government. His petition for a writ of certiorari ("petition" or "Pet.") should be granted because the decision below, which denied him the protection of absolute immunity, is in conflict with rulings by other circuits and this Court, and because the scope of absolute immunity for prosecutors supervising grand juries is a matter of national importance.

ARGUMENT

A. Respondent's Opposition is Flawed By Its Reliance on a Straw Man Argument Regarding Zachem's Role.

The opposition brief ("Opp.") filed by the Respondent, Peter Atherton, never once confronts the *actual* grounds for absolute immunity advanced by Zachem—*i.e.*, that his conduct facilitated the grand jury's consideration of prosecution evidence. Instead, Atherton attempts to respond to an argument of his own choosing by moving the focus *from* Zachem's actual conduct *to* the removal of Atherton from the grand jury—but that is an act that even Atherton concedes was *not* performed by Zachem. Indeed, the opposition brief's first sentence states: "This case involves the involuntary dismissal of a sitting grand juror *by a jury*

officer of the District of Columbia Superior Court." Opp. at 1 (emphasis added).[1]

Atherton is employing a classic "straw man" technique. Because he is unable to counter Zachem's claim to absolute immunity for (1) listening as a supervising AUSA to grand jurors complain that Atherton was impeding their ability to function, and (2) reporting the disruptive conduct to the court so that the grand jury could function, Atherton resorts to charging that Zachem is not entitled to absolute immunity because he violated a court rule about dismissing grand jurors. *See* Opp. at 12. Although Atherton is correct that the Superior Court Rules do not permit a prosecutor to dismiss a grand juror, that issue is not in dispute, and Zachem did not dismiss Atherton or even take a position on his dismissal because it would have been inappropriate for him to do so. *See* Zachem E-Mail; Appendix ("App.") 77a; Pet. at 6, 19.

Atherton's persistent efforts to ascribe to Zachem the "juror removal" conduct, *but nothing else*, is at odds with the case record and cleverly ignores the actions Zachem actually *did* undertake. Indeed, there is no factual dispute, as the parties largely agree on the chain of events involving Atherton's grand jury conduct, which ended with Atherton's dismissal by jury officer Suzanne

[1] Moreover, even if Zachem's conduct is somehow construed as an unauthorized removal of a grand juror, he would *still* be entitled to absolute immunity because all of his actions were taken in direct support of the prosecution's advocatory interest in having its evidence given due consideration by a grand jury.

Bailey-Jones. Notably, Zachem neither started nor ended this chain of events. Nonetheless, Atherton misleadingly focuses solely on the end result (dismissal) instead of the intermediate conduct actually attributable to Zachem. To determine fairly whether absolute immunity is appropriate here, the full narrative must be considered—not just the narrow, inaccurate snapshot presented by Atherton.

As described in more detail in the petition (*see* pp. 3-7), Atherton began to disrupt the grand jury soon after his panel was empanelled on April 9, 2001. When the panel summoned Zachem on April 11, it was after the prosecutor presenting evidence to the panel had mentioned to Zachem multiple complaints about Atherton that day and after another supervising AUSA had responded to problems with Atherton—without taking action—the day before. Upon entering the grand jury room, Zachem heard exasperated jurors explain, on the record, that Atherton was either unwilling or unable to follow the grand jury rules and that his behavior was impeding the panel's ability to consider the government's evidence and vote on indictments. Considering the repeated disruptions caused by Atherton, and the government's manifest interest in having its evidence given due consideration by the grand jury, Zachem sought to fulfill his role as advocate for the government and supervisor of the grand jury by reporting Atherton's conduct to court officials so that *they* could take appropriate action of their choosing.

Zachem took reasonable steps to facilitate the line prosecutor's presentation of the government's evidence and the grand jury's consideration of the same. Against

this backdrop, Atherton's conclusory assertions that Zachem's conduct "had *nothing to do with* the judicial phase of the criminal process" and "had *no bearing on presentation of evidence* to the grand jury" are untenable. Opp. at 11, 24 (emphasis added). Also unfounded are Atherton's attempts to impute his removal from the grand jury to Zachem. He states, for instance, that "Zachem's action violated the applicable court rule [on grand juror removal]," and "Zachem decided *which* grand jurors could consider whatever was presented . . . ." Opp. at 12, 13. However, Atherton's assertion that Zachem "violated the applicable court rule" about juror removal clearly cannot be squared with his concession that it was the jury officer that actually removed him from the grand jury.

Gaps in logic notwithstanding, Atherton proceeds to use this straw man argument throughout his brief—particularly when trying to downplay the conflicts between the D.C. Circuit's ruling, *Atherton v. Dist. of Columbia Office of the Mayor*, 567 F.3d 672 (2009), and the rulings by other circuits and this Court.

B. The Ruling Below Conflicts with Rulings in Other Circuits.

As explained in the petition, the D.C. Circuit's decision in this case is in conflict with *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3036 (1993), and *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990). Like this case, *DeCamp* and *Fields* involved civil suits by plaintiffs who were *not* the target of grand jury investigations against prosecutors who, like Zachem, were supervising

or advising grand juries but not presenting evidence. The Eighth and Second Circuits concluded that the prosecutors' conduct was protected by absolute immunity. *See Fields*, 920 F.2d at 1120 n.2 ("supervision of the grand jury . . . constituted activity within the scope of their judicial duties"); *DeCamp*, 978 F.2d at 1053 ("[W]e agree with the district court that the special prosecutors helped the grand jury prepare its report in their capacity as the grand jury's legal advisors.").

In attempting to distinguish *DeCamp* and *Fields*, Atherton contends that those "prosecutors were acting in a manner authorized by state law," whereas Zachem's "action in procuring Atherton's removal" was unauthorized. Opp. at 9, 11. But this assertion merely displays Atherton's continued reliance on his straw man argument. He erroneously focuses on the juror-removal issue and ignores the fully authorized role Zachem played in supervising the grand jury and facilitating its function.[2] Furthermore, even if Zachem *had* violated a statute or rule by committing an unauthorized removal of a grand juror, that by itself would not prohibit his entitlement to absolute immunity. This Court has afforded absolute immunity to prosecutors even when, for example, they are accused of knowingly presenting

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[2] In addition, Atherton's argument that *DeCamp* "turned on the fact that the function at issue (helping the grand jury to prepare its report) constituted the proper provision of legal advice within the meaning of a state statute," Opp. at 11, is a mischaracterization of that court's holding. While the *DeCamp* court mentions that the state statute authorizes prosecutors to provide legal advice to the grand jury, it in no way suggests that the result would have been different if there was no specific statute in play.

false testimony at trial and deliberately withholding exculpatory evidence from the defense—so long as the conduct is "intimately associated with the judicial phase of the criminal process . . . ." *Imbler v. Pachtman*, 424 U.S. 409, 416, 430 (1976).

Atherton next asserts that the prosecutors in *DeCamp* and *Fields* acted in "direct support of a proper function of a judge or a grand jury . . . ," but "Zachem acted together with a jury officer who has been determined not to enjoy absolute immunity." Opp. at 9. Again, Atherton is attempting to link Zachem's actions to the ultimate decision by Bailey-Jones. The facts, however, show that if Zachem acted on behalf of anyone, it was the grand jurors and line prosecutor. Indeed, under Atherton's skewed logic, where Zachem supposedly "acted together" with the jury officer, the grand jurors who *initiated* Atherton's removal by first reporting him to Zachem would have to be held equally liable. Yet, it is undisputed that the grand jurors and the line prosecutor are protected by absolute immunity. The same should be true for Zachem.

Also without merit is Atherton's suggestion that the *DeCamp* and *Fields* prosecutors' conduct was more like the traditional advocacy function of seeking indictments than Zachem's. Opp. at 11, 13. The prosecutors in those cases, like Zachem, were neither presenting evidence nor seeking indictments. In *DeCamp*, for example, the prosecutors "helped the grand jury prepare its [investigatory] report *in their capacity as the grand jury's legal advisers*." 978 F.2d at 1053 (emphasis added). In fact, the partially-dissenting judge in *DeCamp* voted against absolute immunity for the prosecutors specifically because their conduct was

unlike that of indictment-seeking prosecutors in traditional absolute immunity cases. *See id.* at 1051-52. (Heaney, J., dissenting).

In *Fields*, the prosecutors were protected by absolute immunity for "actions they undertook as legal advisors to the grand jury" even though they merely oversaw the confiscation of unauthorized material from a grand juror.[3] 920 F.2d at 1120. Their conduct had nothing to do with presenting evidence, or even choosing which evidence to present, despite Atherton's convoluted protestations to the contrary. *See* Opp. at 13. Further, in trying to muster a nonexistent contrast, Atherton remarks that "Zachem's conduct had nothing to do with deciding what evidence the grand jury should consider." *Id.* Although this statement is true, it does not demonstrate any actual distinction from *Fields*. Moreover, the implication that Zachem was somehow removed from the judicial process because he did not choose the evidence presented is false. Zachem played a critical role in the indictment-seeking process that was arguably *more* important than the line prosecutor's. Although the line prosecutor *selected* the evidence, Zachem *made it possible for the grand jury to consider it and vote on it.*[4] Furthermore, Atherton's *own complaint* explicitly states that Zachem "participated/coordinated AUSA efforts seeking grand jury

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[3] *Fields* also bears a striking resemblance to the facts here because it involved a suit by a disgruntled grand juror against a supervisory prosecutor for alleged constitutional violations.

[4] This underscores the point that even if the *Fields* and *DeCamp* prosecutors actually *were* seeking indictments, their conduct was no more deserving of absolute immunity than Zachem's.

indictments" and "participat[ed] himself directly/indirectly in efforts to obtain grand jury indictments." Complaint ¶¶ 33, 38; App. 63-64a.[5] Atherton's conclusion that Zachem's conduct "had nothing to do with any core, or even peripheral, prosecutorial function" is simply inaccurate. Opp. at 13.

Finally, although *DeCamp and Fields* may not contain the *exact* facts that exist here because they do not involve the dismissal of a grand juror, they undeniably address the question presented here: whether absolute immunity is afforded to a prosecutor who is sued for undertaking supervisory conduct to facilitate a grand jury's function. Accordingly, this petition should be granted so that the Court can resolve the circuit split.[6]

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[5] Atherton's predictable attempt to disavow these facts now—because they contradict his current position that Zachem was uninvolved with the grand jury's indictment process—should not be countenanced by this Court. Opp. at 25 n.14. Atherton's argument for ignoring inconvenient facts that he himself alleged is that *pro se* complaints, such as his, should be held to a less stringent pleading standard. *Id.* Although this is a well-settled principle, the concept of "'[l]iberal construction' of *pro se* pleadings is merely an embellishment of the notice-pleading standard . . . ." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). It is not a license for Atherton to alter or ignore facts that he alleged in the complaint.

[6] In addition, Atherton's footnote comment about *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), indicates that there is a *fourth* court of appeals involved in this circuit split. *See* Opp. at 20 n.11 ("[O]ther courts of appeals . . . have indicated that when a prosecutor's interaction with a grand jury *does not involve the traditional advocacy function of seeking an indictment*, he may *not* be entitled to absolute immunity." (Emphasis added)).

C. The Ruling Below Conflicts with Supreme Court Precedent.

As stated in the petition, the ruling below is at odds with this Court's recent ruling in *Van de Kamp v. Goldstein*, __ U.S. __, 129 S. Ct. 855 (2009). *Van de Kamp* extended absolute immunity to certain "administrative activities" undertaken by supervisory prosecutors as long as they were "directly connected with the conduct of a trial" and "necessarily require[d] legal knowledge and the exercise of related discretion." *Id.* at 862. Atherton argues that *Van de Kamp* is inapplicable here because Zachem was not "directly connected" to the presentation of evidence to the grand jury in the way that the *Van de Kamp* supervisory prosecutors were directly connected to the trial conduct of line prosecutors they had trained. Opp. at 23-24.

In reality, Zachem was actually *more* "directly related" to the judicial phase of the criminal process than the supervisory prosecutors in *Van de Kamp*. The conduct in question for the *Van de Kamp* defendants was "the[ir] office's *general* methods of supervision and training . . . ." 129 S. Ct. at 862. In other words, the defendants' conduct at issue was the *generic* training that they had imparted on subordinates. This training purportedly impacted subordinate prosecutors' trial conduct, but it was not specifically tailored to any single trial. Zachem's supervisory conduct here, however, was in direct response to a precise problem on a *specific* grand jury panel. Thus, the relationship between Zachem's conduct and the judicial phase in this case is more "directly related" than the relationship between the *Van de Kamp* defendants' conduct and the judicial phase at issue there.

In distinguishing *Van de Camp* in the ruling below, the D.C. Circuit made the mistake of following the same straw man argument Atherton repeats here. The court considered *Van de Kamp* to be "inapposite" because Zachem's activities, which supposedly consisted of "*improperly removing a grand juror*," were not related to "a prosecutor's preparation for or participation in a criminal trial." 567 F.3d at 687 (emphasis added). By failing to grant absolute immunity for Zachem's *actual* conduct, which *was* "directly connected to the conduct" of the judicial phase of the criminal process, the D.C. Circuit departed from *Van de Kamp* and other rulings of this Court. *See* Pet. at 14-17. This Court should grant review to ensure the correct application of its holdings on absolute immunity for supervisory prosecutors.

D. The Question Raised in the Petition is Ripe and Appropriate For the Court's Review.

Over the last 35 years, this Court has demonstrated its considerable interest in the application of absolute immunity to prosecutors by issuing numerous rulings addressing various aspects of the topic. *Id.* Absolute immunity has been extended to prosecutorial conduct before grand juries and, more recently, certain "administrative" acts undertaken in a supervisory capacity. Thus, it is perfectly logical for this Court to consider the scope of absolute immunity for prosecutors acting in a supervisory capacity with regard to grand juries. Indeed, even Atherton concedes that "a supervisory prosecutor who does not actively present evidence to a grand jury may be entitled to absolute immunity under appropriate circumstances." Opp. at 9.

Atherton is correct that "[m]ost prosecutorial immunity cases arise in the context of a criminal defendant suing a prosecutor" and, indeed, "all of this Court's decisions" on the issue dating back to *Imbler* address that situation. Opp. at 14-15. But that is *not* a reason for the Court to avoid the issue raised here. Indeed, given that this issue has now come up in multiple circuits (in a conflicting manner), the fact that this Court has *not* reviewed the issue is actually the exact reason why review is appropriate now.

Finally, Atherton offers no basis for his supposition that these facts are not likely to recur. To the contrary, while the precise facts might not recur, it is not difficult to imagine some future disgruntled person connected with the grand jury process—whether a dismissed grand juror or otherwise—suing a supervisory prosecutor for some perceived wrong. In that context, this is an issue of national import that requires the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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